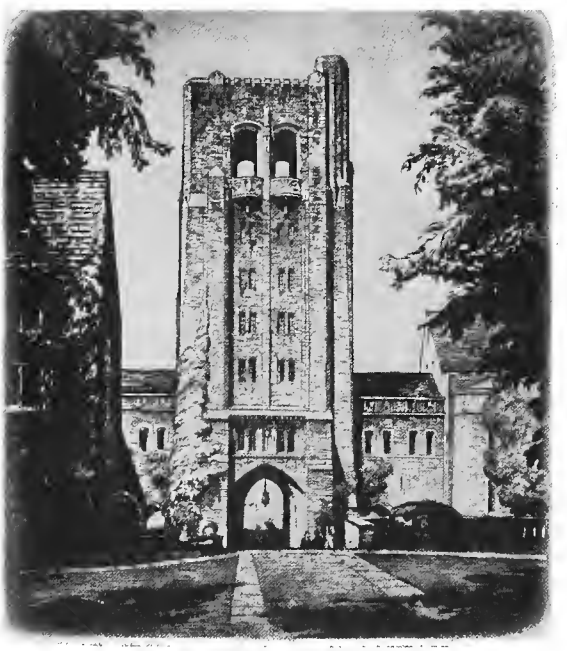

THE LEGAL ESTATE

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THE

DISTINCTIONS AND ANOMALIES

ARISING OUT OF

THE EQUITABLE DOCTRINE OF

THE LEGAL ESTATE

BY

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PREFACE

THIS essay is an attempt to state and examine the various anomalies and anomalous distinctions which arise out of the duality of the legal and equitable estate, and the various doubts and difficulties which are connected with the subject. These, and the duality itself from which they arise, are considered from the point of view of practically effective ownership, and from the standpoint of principle.

The phrase, "the equitable doctrine of the legal estate," is intended to describe the body of equitable principles which determine in what circumstances equity will or will not handle that great factor for good or for ill in equitable property, the legal estate, in relation to equitable rights of a proprietary character. This matter has received far less consideration and attention than its importance deserves. Indeed, I believe that the subject is here considered as a whole for the first time, and that no previous attempt to bring together the distinctions and anomalies now collected has been made. I can therefore scarcely expect that the enumeration will prove exhaustive, but it may at least be a useful beginning in the work of setting down the uncharted rocks and shoals which, to the detriment of the security and sufficiency of equitable title, and to the despair of the student of English property law, abound in this ill-surveyed sea.

The endeavour at the same time made to deal with the matter upon principle, and more especially to find an intelligible basis for the doctrines of the priority of the legal estate and tacking, may also be of some practical utility. The ascertainment of principles is of importance as well to the study of the law, as to its successful amendment[1] and judicial development. If the explanation of tacking here advanced be the true one, it will appear that there has been in recent times a tendency of the courts to extend in more than one direction that justly reprobated doctrine, which, however, according to the accepted judicial axiom is to be applied only within the bare limits of the old authorities which established it. But if the theories put forward should prove upon further investigation not to be sustainable, they may perhaps claim the merit appertaining to hypotheses in general, that they are necessary steps to something more certain.

Perhaps too the statement as a whole of equitable doctrine concerning the legal estate as it now stands—its intricacy, its fortuitous results, its occasional injustice, its technicality and immaturities—may help to make more clear the urgency of the case for the legislative reform of English property law, and the reconstruction of our conveyancing system.

R. M. P. W.

London,
November, 1911.

[1] Thus the *Report of the Registrar of the Land Registry for the years* 1903—5 *as to the work of constructing a General Register of title for the County of London*, says, in reference to abolishing, in that connection, "the time honoured distinction between the legal and equitable estate":—"The clauses required to remove this distinction would need careful drafting, and acquaintance with various anomalies that have grown out of it, for which provision would have to be made."

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p. 58, l. 5: after *of* insert *the*

CHAPTER I

THE DIFFERENTIATION OF THE LEGAL AND THE EQUITABLE ESTATE

"EVERY man that hath lands hath hereby two things in him, that is to say, the possession of the land, which after the law of England is called the frank-tenement or the freehold,

ERRATUM

Page 19. Omit the citation of Carritt's case—the second mortgage was equitable in form as well as in fact, as appears from the Report. Besides, had the mortgage been legal in form, the demise would, it seems, have been good at law in any case, though for the same term as that of the earlier mortgage; *re* Moore and Hulm's Contract, 1912, 2 Ch. 105—Joyce, J.

equitable proprietary right, and the differentiation of legal and equitable proprietary right, whether in land or chattels[4], is of respectable standing in point of time, and the Statute of Uses was but an episode in its history.

But this differentiation, strictly speaking, is not identical with that between mere proprietary right and beneficial right,

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[2] 1535; 27 Hy. VIII. c. 10.

[3] *Reading upon the Statute of Uses*, delivered about 1600, Ed. Rowe, 1804, p. 9.

[4] The expressions, *in rem*, *in personam*, seem best avoided in this connection. The phrases are said to have been coined in the Middle Ages to express the Roman dilemma, and they have never well suited our law. It is to be hoped they will not find their way into the statute book after the manner of *prima facie* and *bona fide*.

CHAPTER I

THE DIFFERENTIATION OF THE LEGAL AND THE EQUITABLE ESTATE

"EVERY man that hath lands hath hereby two things in him, that is to say, the possession of the land, which after the law of England is called the frank-tenement or the freehold, and the other is authority to take thereby the profits of the land[1]." Thus *Doctor and Student*, a treatise published before the Statute of Uses[2], the "authority to take thereby the profits" being the use protected by the Chancellor in the exercise of his equitable jurisdiction. In his hands the use was developing during the sixteenth century into a form of ownership, and something more than a mere claim on the conscience of another, something for most practical purposes even then very like a true right of property. And Bacon, lecturing upon the Statute of Uses at the end of the century, could state definitely, "*Usus est dominium fiduciarium:* Use is an ownership in trust[3]." Equitable proprietary right, and the differentiation of legal and equitable proprietary right, whether in land or chattels[4], is of respectable standing in point of time, and the Statute of Uses was but an episode in its history.

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though the above statement of St Germain and even the statements of some modern writers might lead an unreflecting reader to suppose that it is[1]. For, in the first place, where the equitable and the legal ownership unite in the same person the former ceases to exist with the need for its existence[2], so here at any rate there is a legal beneficial ownership existing at law alone. Again, all equitable proprietary rights are not beneficially enjoyed by their proprietor, *e.g.* in the common case of a resettlement of beneficial interests under a prior settlement which is still on foot; the trustees of the new settlement here hold equitable interests upon trusts. Whether or not the distinction between ownership in trust and beneficial ownership is inevitable in every developed system of law, or whether it was inevitable that some such distinction should have arisen in English jurisprudence[3], it is at any rate part of our legal system, and of course equity has had a large share in developing it. But it is not identical with the distinction between legal and equitable ownership. This last differentiation arises not by reason of any inevitable abstract principle of jurisprudence or even anything intrinsic to the principles of English law. It results solely from the historical accident that different portions of our property law were developed in different courts having separate jurisdictions[4]. Legal proprietary right was developed in the courts of common law; equitable proprietary right in the courts of equity.

The passage from *Doctor and Student* above cited however

[1] "In some systems a distinction is drawn between the strictly legal, and the beneficial, ownership of one and the same object, a distinction expressed in English law by the terms 'legal' and 'equitable' and in Roman law by 'Quiritarian' and 'Bonitarian' property"; Holland, *Jurisprudence*, 11th Ed. 219. The Real Property Commissioners of 1829–33 similarly spoke (Second Report, p. 7) of legal and equitable estates as if the distinction were that between bare and beneficial ownership.

[2] The "Rule in Selby *v.* Alston," *post.*

[3] Salmond, *Jurisprudence*, 234: "Had the courts of common law worked out a doctrine of trusts for themselves, this twofold legal ownership would have actually existed."

[4] Lord Hardwicke, speaking of the doctrine of tacking, said, "It could not happen in any other country but this: because the jurisdiction of law and equity is administered here in different courts, and creates different kind of rights in estates"; Wortley *v.* Birkhead, 2 Ves. sen. 571, 573 (1754).

directs attention to one fact—that beneficial ownership as distinct from bare property was developed mainly in equity. In the case of land, legal ownership developed as seisin, or "possession" in the case of the termor, and ownership was a right to possession or nothing: the objection was fatal, for example, to the action of ejectment that the right to possess was outstanding in even a tenant at will[1]. In the case of chattels, ownership and enjoyment in possession went if anything still more certainly together. The demise and the bailment afford at common law some means of separating (in a sense) the two interests, but these means have been little used with that object. It is in equity almost entirely that the beneficial interest as opposed to the mere proprietary interest has been developed, and equity is still the means by which the separation is effected when required, as of course it is required, for a very great variety of purposes.

The differentiation between legal and equitable proprietary right had been worked out, and the territory divided beyond dispute (speaking generally), long before the two jurisdictions became one by the operation of the Judicature Acts. The courts of common law and the court of chancery have, however, acted in a very different manner towards each other. The former have almost consistently refused to recognise equitable rights—almost, for there seem to be one or two exceptions. One occurs in the fact that an executor is accountable for all assets vesting in him *virtute officii* even though these may include property only recoverable by him in equity[2]. Another exception perhaps exists in the proposition, for which there is some authority[3], that limitations by way of equitable contingent

[1] Because the trespass *vi et armis* which was the foundation of that action must be to actual possession; Runnington, *Ejectment* (1781), 9.

[2] Tweedie *v.* Hayward, 1901, 1 Ch. 221—(as to executor's retainer on account of a debt due to a trustee for the deceased); Cook *v.* Gregson, 3 Drew, 547 (1856)—(equity of redemption); Mutlow *v.* Mutlow, 4 D. G. and J. 539 (1859)—(share of settled fund); "the principle on which a court of law proceeds is to inquire whether the property came to the hands of the executors *virtute officii*: if it did, the court of law regards it as assets, applicable to the payment of the testator's debts; and then a court of equity treats it as legal assets"; Williams, *Executors*, 10th Ed. 1301.

[3] *In re* Freme, 1891, 3 Ch. 167.

remainder (which are not liable to destruction for want of a freehold estate to support them) are not to become liable to defeat in case the legal estate falls in after their creation. This seems to involve the recognition by the common law court of the originally equitable nature of the limitations. An apparent exception may also seem to exist in the fact that the legal estate by *elegit* of a judgment creditor obtains no priority over equitable interests in the land extended, though the creditor had no notice of any prior equitable interest when suing out his *elegit*[1]: but perhaps this is best explained by denying to such creditor the position of a purchaser for value. Lord Mansfield, however, once in an ejectment action at law refused to allow an outstanding legal estate to be set up against a *cestui que trust*[2], and this seems to be really a recognition and application of pure equitable title at common law. An example too, of rudimentary equitable principles in common law itself may be detected in the doctrine of money received to the use of another, that "kind of equitable action to recover back money, which ought not in justice to be kept[3]," which will lie on the ground of mistake, failure of consideration, imposition or extortion, or undue advantage. "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity* to *refund* the money[3]."

But notwithstanding the attitude which the courts of common law, in spite of these equitable leanings[4], maintained

[1] Whitworth *v.* Gaugain, 3 Hare, 416 (1844).

[2] Doe d. Bristowe *v.* Pegge, 1 T. R. 758 (1785). He there observed of the action of ejectment that: "It is of infinite consequence, that it should be adapted to attain the ends of justice, and not entangled in the nets of form." See *post* as to this case.

[3] *Per* Lord Mansfield in Moses *v.* Macferlan, 2 Burr. 1005, 1012 (1760).

[4] Examples before the establishment of equity as a separate system are numerous. Compare the declaration of Dower *ad ostium ecclesiae*; Litt. Lib. I. c. 39, with the covenant to stand seised upon trust; the mortgage of Glanvill's day, with the equitable charge; the early forms of mortgage, too, gave a right to apply for an order resembling foreclosure. Compare also the doctrine at the foundation of the evasion by fine and recovery of the statute *De Donis*, that the issue must abide by their ancestor's alienation and warranty where assets descended from him, with the equitable doctrine of election; and see P. and M. II. 215, for an early tendency to set aside a feoffment made in breach of

towards equitable right, the courts of equity took up a very different position. "As courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, this court never thought fit, that by reason of a prior equity against a man, who had a legal title, that man should be hurt, and this by reason of that force this court necessarily and rightly allows to the common law and to legal titles[1]." And not only indeed is greater respect for certain purposes paid in equity to legal proprietary rights than to the creature of equity itself, but in fact the whole structure of equitable proprietary right is without exception founded and built upon legal interests.

Briefly the doctrine of the priority of the legal estate is this, that an equity will not be enforced against the legal estate of one who has purchased or claims through one who has purchased that legal estate without notice of the equity in question. At common law a conveyance can only take effect subject to any previous conveyance of the same property or of any legal interest in it, notice or none; in equity the rule is similar where the question is between equitable interests alone. The rule is expressed at law[2] by the maxim *Nemo dat quod non habet*; in equity by the rule *qui prior est tempore potior est jure*. But when it becomes a question of the inter-action of law and equity, then equity has come by the exception in favour of the legal title when that title is in competition with a merely equitable one[3]

Inasmuch as the equitable interest is usually (though not always) a beneficial interest and the bare ownership is represented by the legal estate, beneficial interests whether absolute or by way of security for money constitute the species of property which suffers most by the doctrine.

covenant, checked by the *Statutum Walliae* in 1284. In *Doctor and Student* some further comparisons are to be found.

[1] *Per* Lord Hardwicke in Wortley *v.* Birkhead, 2 Ves. sen. 571, 573 (1754).

[2] *Per* Erle, C.J., in 14 C. B., N. S. 257.

[3] Dart, *Vendors and Purchasers*, 7th Ed. 836, states the rule thus: "Where two persons have, in conscience, an equal claim to the same property, equity will not interfere against the one who acquires a legal right to hold it; even though his equitable title is of later date than that of his opponent."

The expression "legal estate" is not native to the common law courts; it is an expression used in courts of equity only, and refers to the differentiation there made between legal and equitable right. It is not suggested however, nor probably has the suggestion ever been made, that this "legal estate" is anything other than legal ownership as known and recognised in the common law courts. Yet equitable ownership intrinsically is but a personal right arising from "the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other[1]." This is a conception widely different from that of legal ownership, and one might perhaps even be prepared for a misapprehension on the part of equity judges (consolidating into doctrine in due course) of the proprietary theory of the common law—the theory that ownership is possession as distinct from and perhaps as opposed to title. This theory even now requires the continued effort of modern scholars to expound to English lawyers and to make generally understood[2]. But the identity of the conception in equity of the legal estate with that of legal ownership seems to have been assumed as a matter of course, by judges[3] and text-book writers alike[4]; and no doubt with good reason.

Equity, it may be remarked in this connection, ignores as legal proprietary rights those "plura jura proprietatis" of Bracton[5], other than the right in actual possession, which look so very like legal ownership of a relative kind. Indeed it is said that "English law only knows various rights to seisin, some more recent, some less recent, which can be asserted by different forms of action[6]," and these give rise to that hierarchy

[1] Salmond, *Jurisprudence*, 230.

[2] Holdsworth, *H. E. L.* III. 85; P. and M. *H. E. L.* Ch. IV; Joshua Williams, *The Seisin of the Freehold*; &c.

[3] *E.g.* Lord Mansfield in Burgess *v.* Wheate, 1 Ed. 223 (1759): "The *forum* where they are adjudged is the only difference between trusts and legal estates" (using the latter phrase, as the context shews, in the meaning of legal property).

[4] *E.g.* Godefroi, *Law of Trusts*, 3rd Ed. 2: "The legal ownership, the actual possession, the 'legal estate,' is in our jurisprudence that which *prima facie* carries with it all the rights attaching to the property."

[5] Bracton, f. 435: "plura possunt esse jura proprietatis et plures possunt habere majus jus aliis, secundum quod fuerint priores vel posteriores" (by reason of better or worse titles to the same property), cited Holdsworth, III. 80.

[6] Holdsworth, III. 80.

of titles to land, in the shape of rights of entry, which constitutes an essential characteristic of our doctrine of seisin. Say that *A* is seised of freehold land; he has disseised *B*, and has not yet acquired against *B* the protection by lapse of time of the Prescription Acts; *C* and *D* have obtained from *A* two different equitable interests, "equal equities" save in point of time of creation, in that freehold land. Suppose *D* next to get in from *B* his right to oust *A*, his "right of entry, a right in many respects equivalent to seisin[1]." Has *D* (assuming he has come by his legal title in a manner that in equity will enable him to use it for the purpose) such a legal estate as will give him priority over *C*? There seems to be no authority for supposing that such a secondary estate or legal title could be put forward as a *tabula in naufragio*. To take the example a little further, suppose that *B* has himself disseised, say, *E*, and that *C* gets in such right or title as *E* has; will it be said that there are two "legal estates" before the court, and that the better will prevail in the struggle? Would a court of equity go into such matters or has it ever done so, or ever sent in such a connection any question as to the relative merits of different legal titles to be tried at law? The absence of authority seems conclusively to answer no to both these questions: competing legal titles often come before the court in other connections and (far less than a "plank") any straw, would, it might be thought, have often enough been grasped in the shipwreck out of which priority claims generally arise. It seems best to explain the matter by saying that these secondary legal rights, though in the theory of the common law of a proprietary character, are, at any rate in the eye of equity, but choses in action, or rights of action, good only against the owner in possession, and not true proprietary rights good against the world. And no difficulty need be felt by reason of the rule in equity that all parties must be before the court, seeing that the court had no jurisdiction to establish such legal proprietary claims; it might well therefore disregard anyone out of possession until his rights had been established in the proper quarter.

[1] Joshua Williams, *The Seisin of the Freehold* (1878), 8.

Nevertheless equity has in the doctrine of "the best right to call for the legal estate" recognised some such a position in equitable right—a species of equitable right of entry as it were, the benefit of an estate not in possession as if in possession. It is hard to say why equity should admit this while refusing the like benefit to one who has the legal "majus jus" of a right of entry—a right that will support a contingent remainder[1], that will descend to heirs, and is "in many respects equivalent to seisin"—so very nearly an estate in actual possession in fact that on entry the possession will "relate back" so as to enable an action to be maintained for a trespass committed in the meanwhile[2].

The doctrine of the "best right to call for the legal estate" was extensively used in conveyancing practice to secure the protection of satisfied terms held on trust to attend the inheritance. The term of course remained valid against all incumbrances legal or equitable subsequent in date to its creation. The trust was needed to prevent merger, and was held to give the owner of the land, *cestui que trust* of the term, the benefit of this legal interest in the land. Nearly all the old authorities for the doctrine are cases relating to such terms of years.

The doctrine and the principal authorities on which it now rests were thus stated by Stirling, L.J., in a recent case[3]:

"Now, a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in Wilkes *v.* Bodington[4]. It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he

[1] Challis, *Real Property*, 3rd Ed. 121.

[2] Ocean Accident &c. Corpn. *v.* Ilford Gas Co., 1905, 2 K. B. 493—C. A.

[3] Taylor *v.* London and County Banking Co., 1901, 2 Ch. 231, 262—C. A.

[4] 2 Vern. 599 (1707)—Cowper, L.C. But Bassett *v.* Hungerford, 2 Vern. 524 (1705)—Wright, Lord Keeper, seems to constitute a still earlier instance.

may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority: see Wilkes *v.* Bodington, Maundrell *v.* Maundrell[1], Stanhope *v.* Earl Verney[2], Wilmot *v.* Pike[3], and Rooper *v.* Harrison[4]." Closely viewed, perhaps these cases are not very strong authority for the full modern rule; but this rule must be taken as settled. The rule is not, it may be mentioned in passing, the same thing as the best right to redeem, and must be distinguished from it; the best right to redeem the legal mortgage gives no priority[5].

The basis of the doctrine appears to be the existence of a trust of the legal estate. The only excuse, however, for the unmerited advantage which the legal estate confers in priority cases is the special respect which is paid in equity to legal right (respect, if the principle be more truly stated, for the frontier line as settled in the past between the rival jurisdictions), but here at any rate is no call for such respect.

Perhaps the origin of this curious doctrine is to be sought in the equitable nature of the action of ejectment. "So long ago as the time of Justice Gundry[6]," said Buller, J., in an ejectment action some thirty years later[7], "where an outstanding satisfied term was offered by a defendant in ejectment as a bar to the plaintiff's recovery, that judge refused to admit it, saying, that there was no use in taking an outstanding term, but for the sake of the conveyancers' pockets; since which time it has been the uniform doctrine, that if the plaintiff is entitled to the beneficial interest he shall recover the possession." And Buller, J., in the same case related two instances within his knowledge in which one admittedly a mortgagor who had parted with his legal estate was permitted to recover against an adverse claimant who happened also to be his lessee for years. But it is evident that this case is no authority for extending the matter (except where, as in the last-mentioned instances, there may be

[1] 10 Ves. 246 (1805)—Lord Eldon.
[2] 2 Eden, 81 (1761)—Lord Henley, afterwards Northington.
[3] 5 Hare, 14 (1845)—Wigram, V.C.
[4] 2 K. and J. 85 (1855)—Page-Wood, V.C.
[5] *Per* Malins, V.C., *in re* Russell Road Purchase-moneys, 12 Eq. 78, 85.
[6] A judge of the Common Pleas, 1750–4; Foss.
[7] Doe d. Bristowe *v.* Pegge, 1 T. R. 758 (1785).

an estoppel between the parties against setting up the fact of the legal estate being outstanding) beyond express trusts. "A trust shall never be set up against him for whom the trust was intended," said Mansfield, C.J., in the same case, after having remarked upon the informal nature of the action of ejectment. "Great difficulties have arisen," he said, "as to the legal form of passing land, from the modes of conveyancing in England since the Statute of Uses. Trusts are a mode of conveyance peculiar to this country....If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue from the representatives of the trustees not being to be found."

The explanation of the doctrine can scarcely lie merely in the principle that "equity looks on that as done which ought to have been done[1]"; for this maxim is generally considered as applicable only in favour of purchasers for valuable consideration. Besides, if this were the basis, there seems to be no reason why the doctrine should stop at an express trust, and why it should not be carried to the extreme limit of the Walsh *v.* Lonsdale[2] class of cases. Fortunately no such extension has at present been successful, or, for example, an undertaking to execute a legal mortgage given by the memorandum accompanying a deposit of deeds would presumably give a "right to call" in the full sense. But it has been held not to do so[3]. Neither, as has been remarked, does a right to redeem. Thus, again, a judgment is a right to obtain a legal estate by execution, but it may not be tacked[4], though an estate held in the name of a trustee may be[5].

The powers of dealing with land which the Land Transfer Acts confer upon a registered proprietor, amount for the purposes of the equitable doctrine neither to a legal estate, nor to a right to call for the legal estate. The idea of powers is very well understood in practice, but it is hard for English lawyers to

[1] A "mortgagee, having a better right to call for the assignment, is in equity in the same state as if he had it"; Lord Eldon in *ex parte* Knott, 11 Ves. 609, 618 (1806).

[2] 21 Ch. D. 9—C. A.

[3] Garnham *v.* Skipper, 55 L. J. N. S. Ch. 263 (1885)—North, J.

[4] Hacket *v.* Wakefield, Hard. 172 (1660).

[5] Bassett *v.* Hungerford, *ante*.

recognise that ownership is merely a bundle of powers, and may exist independently of that archaic conception of our early law[1], and still the *pons asinorum* for our students of real property law, an estate in the land. A decision of the Court of Appeal has been needed before the notion would find entire credence that the Acts conferred ownership without any estate either legal, equitable or statutory. "The transfer by registered disposition takes effect by virtue of an over-riding power, and not by virtue of any estate in the registered proprietor[2]." Perhaps the difficulty was increased by the fact that the Acts themselves seem to have halted somewhat between the two ideas, for in certain cases an estate does appear to be vested by mere registration[3].

This idea of an "estate" as an abstraction which is at once the definition of the rights of ownership, and also itself the subject of ownership, as distinct from those rights of ownership themselves, is peculiar to realty. The word has not of course here the same meaning as in the expressions the equitable or the legal estate. In this last sense the word "estate" is used simply as equivalent to "property," namely proprietary right, or in the case of the equitable estate that which is as nearly equivalent to proprietary right as the system of equitable jurisprudence will permit. In this sense a legal or an equitable estate may exist as well in personalty as in land. Witness Brett and Baggallay, L.JJ., who speak, as to the property in goods which the endorsement of a bill of lading is effective to pass[4], of "the legal property," "legal ownership," "the equitable interest"; and Lord Selborne, commenting on this case[5], said that those judges "clearly used the words 'legal' and 'equitable' in that technical sense which they have acquired in English law," and with the same consequence of the duality

[1] "The distinction in fact, between a right and the subject of a right is a feat of abstraction of which it is quite incapable"; Holdsworth, *H. E. L.* II. 296.

[2] Capital and Counties Bank *v.* Rhodes, 1903, 1 Ch. 631, 655; *per* Cozens-Hardy, M.R.

[3] Land Transfer Act, 1875, sec. 7 in particular.

[4] Glyn *v.* East and West India Dock Company, 6 Q. B. D. 475—C. A.

[5] In Sewell *v.* Burdick, 10 A. C. 74, 79.

as in the case of land, namely, that one who has the legal property in the goods "may" (*per* Lord Bramwell[1]) "sell and pass the entire property to one not having notice of the equitable title"[2]. Again, a chose in action is equally subject to the doctrine. Thus[3], a blank transfer accompanying the deposit of a stock certificate at a bank to secure a loan, having been held insufficient to pass "the legal title" (Lindley, L.J.), "the legal interest" (Kay, L.J.), in the stock, the consequence was held to follow that the bank had failed to displace another equity prior in point of time—"being purchasers for value without notice," said Kay, L.J., "they cannot succeed, unless they can make out that having an inferior equity they have clothed it with a legal interest." If any authority were needed for the proposition, familiar to all conveyancers, that the doctrine of the legal estate applies to leaseholds, the old cases cited above in reference to attendant terms will serve.

In these circumstances it would seem somewhat strange that so little care is taken by purchasers of property other than land in the matter of enquiring into the title, while so much care is taken where interests in land are concerned. The chief danger to title lies in the hidden equitable or the destructive legal estate. But were it necessary that an abstract of title should be delivered upon, for instance, every stock exchange transaction, as in the case of dealings with land, business would be considerably hampered and expenses increased, as need scarcely be remarked. A very likely case for the hidden equity where stocks and shares are concerned occurs where these have been sold "*cum* rights," and afterwards the "rights" are issued to the vendor before registration of the purchaser: the purchaser can claim the new shares against the vendor so long as the vendor has not transferred them to a *bona fide* purchaser without notice. One reason for not investigating title where goods are concerned lies in the fact that the doctrine of constructive notice does not apply here[4], and this of course removes a great source of risk

[1] In Sewell *v.* Burdick, 10 A. C. 104.
[2] Joseph *v.* Lyons, 15 Q. B. D. 280—C. A., is an actual instance.
[3] Powell *v.* London and Provincial Bank, 1893, 2 Ch. 555—C. A.
[4] Joseph *v.* Lyons, *sup.*

to purchasers who do not make full enquiry. But still there is some risk, and the reason it is generally disregarded in practice seems to be that the claims of the owner out of possession against the person in possession have never become so strong in the case of chattels as in the case of land[1]. Special causes also make for greater security of title to chattels: the rules of market overt; the fact that the possessor usually is also the absolute owner, through the absence of successive interests or "estates" in the special sense above mentioned; the reputed ownership provision of the Bankruptcy Act[2] (as regards assignees under those Acts); the Bills of Sale Acts. The practical difficulty of tracing chattels, too, is another of the reasons why less misgiving is ordinarily felt by a purchaser of chattels than by a purchaser of land.

As to choses in action, the rule in Dearle *v.* Hall is of assistance, and the important classes of marketable securities and life policies are both protected by registration.

The point may be noted that the legal estate, for equitable purposes, is not confined to such a legal estate as confers possessory rights over physical property. It is enough that the legal interest confers some proprietary right known to the law and that the equitable interest corresponds to it in this sense, that the owner of that equitable interest is in equity the person for whose benefit that proprietary right is deemed to be exercisable. Equity, as has been said, ignores as having legal estates, claimants out of possession of their legal proprietary rights, but from this it does not follow that only proprietary rights to physical possession are allowed as effective for purposes of the equitable doctrine giving priority. That contention was once put forward before Malins, V.C.[3], who sufficiently disposed of it by instancing a mortgage in fee without notice of a prior equitable incumbrance: there, he said, "nobody will doubt that the second mortgagee has priority. But the land which is the subject of the mortgage is probably in the possession of tenants

[1] Compare the development, in the two cases, of the rights of the owner out of possession as described by Holdsworth, III. 82 and 267 *et seq.*

[2] 1883, sec. 44.

[3] *In re* Russell Road Purchase-moneys, 12 Eq. 78, 85.

against whom there is no right to maintain ejectment, and what is mortgaged is in fact the reversion. The mortgagee has the freehold in possession, but not the land in possession." It is the legal interest that must be in possession, not the property itself in which the interest subsists.

The differentiation between the legal and the equitable estate ceases altogether when the beneficial right in equity is vested in the legal owner. This doctrine is sometimes called the Rule in Selby *v.* Alston[1], though Arden, M.R., there but followed and approved Lord Thurlow, who in a earlier case[2] laid down that "it is universally true, that where the estates unite, the equitable must merge in the legal." Of this proposition of Lord Thurlow, Arden, M.R., said that "upon consideration, I am inclined not to lay any restriction upon, or to narrow it in any respect, but to hold, that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail, the equitable is totally gone, for the purpose of being acted upon by any person in this court." The one or the other, the legal or the equitable, title must prevail, since different positions may arise accordingly. Equity has given the preference to the legal estate, and in doing so has been at any rate consistent[3], though the result is sometimes curious, as the case of Selby *v.* Alston itself will instance[4].

[1] 3 Ves. 339, 342 (1797).

[2] Wade *v.* Paget, 1 Bro. C. C. 363, 368 (1784). For a modern instance, see *in re* Selous, 1901, 1 Ch. 921. Farwell, J., there held an equitable tenancy in common to merge in a joint legal tenancy, for "a person cannot be a trustee for himself, so neither can two or more"; the difference in interest between the two estates was too shadowy to keep them apart.

[3] Consistent not only in respecting legal right, but in principle. In Brydges *v.* Brydges, 3 Ves. 120, 127 (1796), Arden, M.R., explained the matter thus: "When I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction; that it is the same estate in equity and at law. There is then no person upon whom this court can act...where the person is seised of the estate at law and of the same estate in equity, he cannot have a *subpœna* against himself. There is nothing upon which equity can act. The equitable estate is absorbed: the better phrase is, that it no longer exists."

[4] Testator having agreed to buy real estate died leaving his widow trustee for their son; the conveyance is taken by the widow; she dies; then the son

Another instance occurs, for example, where property becomes liable to legal incidents not affecting equitable estates—dower was put by the court in the above case as an illustration. (Dower would at that day be excluded as long as the equitable interest remained alive.)

The respect paid to legal right is on principle in every case anomalous in that it is merely to legal right, not to ownership in trust as distinguished from beneficial ownership, that this respect is paid. There is of course in the case of equitable estates not held beneficially no *quasi* "legal estate" in the trustees as distinguished from the beneficial interests of the *cestuis que trustent*: our distinction "legal" and "equitable" depends on the historical accident of jurisdiction and is not, as has been pointed out above, conterminous with ownership in trust and beneficial ownership. Equities held on trust are no "higher" on account of being so held than equities conferring only beneficial enjoyment. Nevertheless even beneficial equitable interests are property in the practical and the true sense of the word; and as has been seen "ownership in trust" has been spoken of at least as long ago as Bacon. If the equitable rule of according priority to the legal estate has any longer a basis of reason for continued existence, what reason can there be why it should not apply to equitable property held in trust? There can of course be none; and there is in fact no longer any such basis. The order of priority that prevails between legal interests themselves[1], and between equitable interests themselves, should apply also as between legal and equitable interests, that is, the order of time of creation.

Each species of property had its peculiar origin, legal

dies: the heir at law on the father's side now claims the estate by reason of the equity to a conveyance in the testator; the heir at law on the mother's side relies on the legal estate that has descended through her. This latter claim is preferred, because the equitable and the legal estate had in the meanwhile united in the son to the destruction of the equity. Had the son predeceased the mother the case must have been otherwise, as the court pointed out, for then the equity would have remained and descended.

[1] Hurst *v.* Hurst, 16 Beav. 372 (1852), is a good illustration; a mortgage term created by a legal tenant for life in his life estate has priority over a portion term created under a power by that tenant for life in the inheritance, but later in the date of its creation.

property in that possession which in early times was alone protected by the remedies given by a rude procedure, and equitable property could be said to have been originally in fact, "no more but a general trust when any one will trust the conscience of another better than his own estate and possession[1]." In the case of legal property the results of primitive theory have been gradually eliminated—the title of the true owner has gradually, as the common law developed, prevailed over the right given by mere possession, and one of the last of the pitfalls for legal title, the tortious feoffment, disappeared early in the days of modern law reform[2]. The development of the legal ownership of chattels was parallel[3]. A like pitfall, however, for equitable ownership, whether of land or chattels, still remains in the "superior force and strength" allowed to the legal title: and the alienation of legal property may in consequence still have a tortious operation so far as equities are concerned. By this pitfall, though it has no counterpart as between equities themselves, the whole fabric of equitable property based upon the legal title is rendered insecure, and unfortunately, proprietary equities must from their nature always be ultimately based on a legal estate. Yet any legal interest, be it but the smallest[4], is safe, notice or no notice; and seisin for a legal interest may be had of even incorporeal hereditaments. Whatever reason may have originally existed for the rule has of course now gone, at any rate since the Judicature Act, 1873, came into force. "It would seem," Lord Blackburn has said[5], "that now after for a very long time equitable estates have been treated and dealt with as to all other intents estates, any rules founded on the antiquated law ought to be no longer applicable, and that *cessante ratione cessare debet et lex.*" Well recognised equitable proprietary interests should no longer be treated, in relation to the proprietor of the legal title, as no more than "ground in equity or conscience to take it from him."

[1] Bacon, *Reading*, 30 (Ed. *sup.*).
[2] Real Property Act, 1845, sec. 4.
[3] Holdsworth, III. 82, 281.
[4] *In re* Russell Road Purchase-moneys, 12 Eq. 78, is an instance.
[5] Jennings *v.* Jordan, 6 A. C. 693, 714.

The anomaly of the tortious operation of the legal state, for so it may be expressed, is made to stand out strongly by that very resemblance to actual proprietary rights which many equities possess. There the action of the doctrine must often take the unlearned completely by surprise. Thus even an equitable lien of a trustee upon the trust property has been held to be a sufficient "property" in him personally to vest the whole of that trust property in his trustee in bankruptcy, and to take the case out of section 44 of the Bankruptcy Act which excludes "property held by the bankrupt on trust for any other person"[1]—a very strong instance of the proprietary characteristics of which equities are capable. Again, the reasoning of Plumer, M.R., in Dearle *v.* Hall[2], was largely based on the proprietary character of an equitable interest and that it is as capable of possession as the subject admits. As such an interest does not permit of physical possession it is necessary to "do that which is tantamount to obtaining possession," namely, to give notice, which therefore will "give a complete right *in rem*, and not merely a right against him who conveys his interest."

The equity of redemption is a remarkable example of the ingenuity spent upon attaining for equitable interests their close approximation to legal proprietary right. It furnishes too a case of perhaps the widest divergence between form and fact. In form it is but a personal right, a right which merely places the legal owner "under an obligation to use his ownership for the benefit of the other[3]." But in fact, "in equity (where this branch of our jurisprudence originated) the conveyance of the legal estate to a mortgagee was regarded as nothing more than a security for a debt[4]." And, "an equity of redemption[5] has always been considered as an estate in the land, for it may be

[1] St Thomas' Hospital *v.* Richardson, 1910, 1 K. B. 271—C. A.

[2] 3 Russ. 1, 23, 24. The reasoning was equally applied to a chose in action.

[3] Salmond, definition of equitable ownership, *ante*.

[4] Lord Selborne, L.C., in Heath *v.* Pugh, 6 Q. B. D. 345, 359.

[5] Distinguish an estate in land subject to a charge by will for payment of debts or in favour of a beneficiary. Such a charge confers no right of foreclosure; *in re* Owen, 1894, 3 Ch. 220. Even an equitable mortgagee by deposit, however, has the remedy of foreclosure; James *v.* James, L. R. 16 Eq. 153—Vice-Chancellors' Court.

devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin[1]." A seisin, that almost sacred thing in common law[2]—this indeed is a high ideal for equitable right, and at once places its defeat by the legal estate well within the comparison made above in regard to the tortious feoffment.

Where equity most diligently "follows the law," there the resemblance of equitable to legal right is the most deceptive: some equities so nearly resemble legal right that until the appearance of the *bona fide* purchaser breaks the spell, the very elect may be deceived. Thus the right to enforce a negative covenant under the rule in Tulk *v.* Moxhay, for example, a right which is in fact so far personal that, as it has been settled[3], the perpetuity rule does not apply to it, has been spoken of by no less an authority than Jessel, M.R., as "an extension in equity of the doctrine of Spencer's case," or "of the doctrine of negative easements; such, for instance, as a right to the access of light[4]." And though he mentioned also the qualification in regard to the *bona fide* purchaser, a similar view is likely to be taken by many without thought of qualification: rights such as these pass on sale of land as "appurtenances" without mention and by presumption of law[5]; and they are rights which are so far real that their exemption from the perpetuity rule can be fitly stated as an exception to that rule[6]. Such equities as these at least, may well be assumed to have all the other attributes of real right until the *bona fide* purchaser appears. Then the doctrine of the legal estate does its fell work; what was thought to be solid property is gone, and "the *cestui que trust*, the absolute equitable owner[7]" is undone. A trap for the unwary and the

[1] Lord Hardwicke, L.C., in Casborne *v.* Scarfe, 1 Atk. 603 (1737).

[2] "The Beatitude of Seisin," Maitland, *L. Q. R.* IV. 24, 286.

[3] L. and S. W. Ry. *v.* Gomm, 20 Ch. D. 562—C. A. [4] *Ib.* at p. 583.

[5] Rogers *v.* Hosegood, 1900, 2 Ch. 388—C. A.

[6] Challis, *R. P.* 3rd Ed. 186, and Jessel, M.R., in L. and S. W. Ry. *v.* Gomm, *ub. sup.* p. 583: "That doctrine" (of Tulk *v.* Moxhay) "...is, if I may say so, another exception to the rules against remoteness"; the covenant gives an interest in land; it binds the land, and indeed cannot be enforced as a mere contract against third parties.

[7] hitty, J., 42 Ch. D. 270.

unlearned is this resemblance to legal proprietary right, so carefully fostered by the court of chancery, though with the best intentions. The strange part is that it is equity's own doctrine whereby these intentions are thus often defeated. Surely the doctrine is one of the most anomalous of the "anomalies that adorn our law[1]."

Whether or not a proprietary interest is legal or equitable, that is, whether it is to be exposed or not to the possibility of defeat in this way, is one which very often depends upon some accident—upon something entirely extraneous in justice or reason to the situation. It would be difficult to find a more striking instance of this fortuitous element than is furnished in Carritt *v.* Real and Personal Advance Company[2]. A lease was vested in a trustee for the plaintiff: the trustee fraudulently mortgaged by sub-demise. It happened that there was a prior mortgage by sub-demise and for the same term. The result was that the fraudulent trustee had made only an equitable and not a legal mortgage, for his intended sub-demise operated as an assignment of the prior mortgage term, of course subject to the prior mortgage. Namely, the trustee had made only a second mortgage. Consequently the *cestui que trust*, fortunately for him, prevailed over it; had the trustee demised the property for but a single day less he would have created a legal interest and the *cestui que trust* would have been postponed to the fraudulent mortgage.

There is another direction in which equity shews respect for legal right—postponement for negligence. The mere fact by itself of an equitable interest being prior in point of time of creation or acquisition to the legal estate is not a circumstance strong enough, as has already appeared, to give an equity to take away that legal estate from him who has it. Neither is it any ground for postponing the legal to the equitable estate that some negligence attributable to the owner of the legal estate has led to the creation or acquisition of the equitable. But in regard to this last, there is a distinction between legal and equitable estates, and one which has frequent application in those unfortunate cases where one of two innocent parties has

[1] Farwell, J., in 1905, 1 Ch. 546. [2] 42 Ch. D. 263—Chitty, J.

to suffer for the wrong of a third. "As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other[1]." And "when equities are not equal, then the priority of date is easily got over, at any rate, as between equitable incumbrancers[2]." But where there is a legal estate in question, then: "The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the court in depriving a legal mortgagee of the benefit of the legal estate[3]." In this last case the circumstances are very different and require to be much stronger. Reference to this and another[4] judgment, too long to cite here, both of Fry, L.J., will indicate that difference. Neither in the case of legal nor of equitable interests does the standard seem to be quite the same as that laid down in regard to constructive notice[5], though many postponement cases may obviously rest also on that ground. As between equitable interests alone the negligence may perhaps amount to less, but something very like fraud is needed to postpone the legal owner.

Closely connected with this topic is that of the custody of deeds. "I think," said Pearson, J.[6], "upon the authorities which have been cited, and which are so well known that it would be pedantry for me to go over them again, the doctrine of this court has always been, that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them." This however seems to be no arbitrary rule for deciding which of two innocent parties shall suffer for the wrong of a third; nor again, where a legal estate is obtained, is it a matter solely of constructive notice concerning the existence of prior equities. The reason for the rule

[1] *Per* Cotton, L.J., in National Provincial Bank of England *v.* Jackson, 33 Ch. D. 1, 13—C. A.

[2] *Per* North, J., in Farrand *v.* Yorkshire Banking Company, 40 Ch. D. 182, 188.

[3] *Per* Fry, L.J., in Northern, &c., Insurance Company *v.* Whipp, 26 Ch. D. 482, 487—C. A.

[4] Union Bank of London *v.* Kent, 39 Ch. D. 238, 247.

[5] Compare *per* Cotton, L.J., in National Provincial Bank of England *v.* Jackson, *sup.* at p. 12.

[6] Lloyd's Banking Company *v.* Jones, 29 Ch. D. 221, 229.

probably lies in the matter of negligence and probably the rule does not go further. Thus Buller, J., in an old authority said[1]: "It is an established rule in a court of equity that a second mortgagee, who has the title deeds, without notice of any prior incumbrance shall be preferred; because if a mortgagee lends money upon mortgage without taking the title deeds he enables the mortgagor to commit a fraud." The ingenious suggestion was however once put forward before Romilly, M.R.[2], that the legal interest in the deeds as chattels arising by their mere delivery and acquired for valuable consideration without notice must prevail over prior equities. He however held that the right to retain possession of title deeds only arises where the holder has a beneficial interest in the property to which they relate, or a right to redeem it. If the person creating the charge have none, then he can pass no scintilla of interest in the property to the person to whom he delivers the deeds; and there is no interest in the parchment as distinct from the land. The point seems to carry this result, that an equitable owner who has parted with the whole of his interest which carries with it the right to hold the deeds cannot place a subsequent assignee in a better position by handing them over to him. This consideration seems substantially to diminish the safeguard which title deeds are supposed to afford.

And in this connection, there is another consideration: a subsequent incumbrancer or other assignee of some interest however small who gets the deeds, is entitled to retain them in respect to that interest. Even a prior incumbrancer cannot take them away from him, unless indeed he have been expressly granted the deeds, as it was the old conveyancing practice to do[3]. Should the subsequent incumbrancer make fraudulent use of the deeds, it seems, consequently, difficult to suppose that a prior incumbrancer would in all cases be postponed, that is, where no negligence was attributable; and here again therefore an innocent third party taking the deeds might not be thereby protected.

[1] Goodtitle *v.* Morgan, 1 T. R. 755, 762 (1787).
[2] Newton *v.* Newton, 6 Eq. 135.
[3] Yea *v.* Field, 2 T. R. 708 (1788)—Lord Kenyon, C.J.

CHAPTER II

THE LEGAL ESTATE AND THE PLEA OF *BONA FIDE* PURCHASER

In the days of formal pleadings, the equitable plea of purchaser for valuable consideration without notice was constantly before the courts; and yet in regard to this plea "a reference to the judicial authorities discloses an amount of conflict in the decisions greater, perhaps, than has attended the development of any other equity rule or doctrine; and such statements as we find of any general principle are almost equally at variance[1]." This tangled subject must however be given a glance here both for the sake of historical interest and for the practical purpose of ascertaining how if at all it concerns modern equitable doctrine as to the legal estate, or whether it can safely be disregarded. In either event an understanding of the matter would assist to isolate many of the old decisions and their conflicts, and so prevent the importation of some of their confusion into that doctrine. That we have not always been quite clear as to the relation between the plea of *bona fide* purchaser and the doctrine of the priority accorded in equity to the legal estate has perhaps been the cause of some of the difficulties in each.

The origin both of the equitable doctrine relating to the plea and of that relating to the legal estate is at any rate the same. "The separation and division of jurisdictions between

[1] F. O. Haynes, *Outlines of Equity*, 5th Ed. (1880), 388, where many of the cases are discussed. See also *Wh. & T. L. C.* 7th Ed. II. 153, Note to Bassett *v.* Nosworthy, for later cases.

the courts of equity and the courts of common law," said Lord Selborne recently[1], when speaking of the plea in question, "was the real and only ground on which such a defence was admitted." But both in their sphere of application and in their results the equitable plea and the equitable doctrine referred to are widely different. The general theory of the priority of the legal estate has been described; let us now enquire what the plea involves and what concern it has with this doctrine.

The case of Phillips *v.* Phillips[2] is usually regarded as the leading case on the subject of the plea. In that case Lord Westbury laid down a famous classification which has, however, been so much discussed that it has rather added fuel to the controversy than assisted to dispose of it.

Lord Westbury said: "There appear to be three cases in which the use of this defence is most familiar:—First, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title," and he cited Bassett *v.* Nosworthy[3], Wallwyn *v.* Lee[4], Williams *v.* Lambe[5], and Collins *v.* Archer[6]. "The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage....He will not be deprived of this advantage by a court of equity...for the principle is, that a court of equity will not disarm a purchaser—that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate, as for example, an equity to set aside a deed for fraud, or to correct it for mistake, and the purchaser under the instrument maintains the plea of purchase for valuable consideration without

[1] Ind, Coope *v.* Emmerson, 12 A. C. 300, 306.
[2] 4 D. G. F. and J. 208 (1861).
[3] Rep. t. Finch, 102 (1673)—Lord Keeper Finch.
[4] 9 Ves. 24 (1803)—Lord Eldon.
[5] 3 Bro. C. C. 264 (1791)—Lord Thurlow.
[6] 1 Russ. and M. 284 (1830)—Leach, M.R.

notice, the court will not interfere." Of this celebrated dictum, Mr Haynes[1], who has dealt with the cases more exhaustively, perhaps, than any other writer, observes that Lord Westbury made no attempt to define completely the limits of the application of the doctrine, but contented himself with classifying the cases and distinguishing them from that before him; and he adds: "The judgment of Lord Westbury has been the subject of much comment, and cannot, it is considered, be regarded as unimpeachable in all respects; but the classification of cases adopted by him is sufficiently accurate for general purposes, and...the only one possessing any sanction of judicial authority."

As to the first class of cases, this auxiliary jurisdiction of the court is, in theory at least, a discretionary one. In its exercise, equity came to the assistance indifferently of legal right or of equitable right in such matters as the delivery up of title deeds, rectification or cancellation of documents, discovery, bills to perpetuate testimony, and so on. There the plea was a complete bar. It was good against a legal estate "not because there was an equitable defence, but because the title was legal and the plaintiff stated no equity....As against an innocent purchaser, sued at law, the court of chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere[2]." "For" (in the absence of any stronger equity moving the court) "equity will not disarm a purchaser[3]"—where, that is, equity has the choice. But where the court has concurrent jurisdiction—dower is a common example[4]—where, that is, the very purpose of equity is to aid legal right with more efficient remedy than can be had at law, its function is something more than merely to provide discretionary assistance when the equity of the particular case appears to demand assistance. If therefore the only operation of the plea was in bar of the exercise of

[1] *Outlines*, *sup.* at p. 390.

[2] *Per* Lord Selborne, in Ind, Coope *v.* Emmerson, *ub. sup.*

[3] Lord Nottingham (then Lord Keeper Finch) in Bassett *v.* Nosworthy; Rep. t. Finch, 102.

[4] Williams *v.* Lambe, *sup.*

the auxiliary jurisdiction[1], then the plea has disappeared for ever, for by the merger of the courts that jurisdiction is auxiliary no longer, and has become concurrent. But the doctrine giving priority in equity to the legal estate is still with us, that at any rate is certain.

The second class of cases laid down by Lord Westbury as coming within the plea of purchaser for valuable consideration without notice is of course the ordinary case of tacking.

The precise scope of the third class as distinct from the first does not call for discussion here; the matter with which we have special concern is the second class of cases. Let us however glance at the general theory of the plea as affecting the legal estate in equity before dealing with this.

According to that theory, the court may be imagined as saying to one with a legal estate who seeks the aid of equity: "You have only a legal right; this is a court of equity, and the defendant is a purchaser without notice. You have no equity by reason merely of that legal estate to move such a court to give you its special remedies against such a purchaser." The legal title is left accordingly to its remedies if any at law. In consequence of this it apparently at one time came to be thought that the plea was good only against a legal title. But this was entirely to misunderstand its principle. As Lord Westbury said in Phillips *v.* Phillips, the plea "seems at first to have been used as a shield against the claim in equity of persons having a legal title. Bassett *v.* Nosworthy is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance together with the maxim which I have referred to" (*qui prior est tempore*, &c), "probably gave rise to the notion that this defence was good only against the legal title." Another source of confusion lies in the fact that, on the other hand, the cases concerning priority establish that the legal estate in the hands of a *bona fide* purchaser will prevail only against an equitable,

[1] See *per* North, J., in support of this theory in Manners *v.* Mew, 29 Ch. D. 725. That the plea does not operate in bar of the (at any rate originally) concurrent jurisdiction, see *per* Lord Westbury and Lord Selborne, *ub. sup.*, and *per* Romilly, M.R., *pass.*

not a legal prior title. If that doctrine is to be identified with the plea of *bona fide* purchaser, it looks at first sight as though the plea were good only against an equitable title. But this is in fact a very different subject and should not be confused with the plea. Of this last Lord St Leonards says[1]: "The title of a purchaser for valuable consideration without notice is a shield to defend the possession of the purchaser, not a sword to attack the possession of others." But the legal estate has been seen to be a sharp sword of tortious operation and against it an equitable estate, even in the hands of such a purchaser, may expect no protection not only from a court of law but from the courts of equity themselves. Let two great authorities describe the plea further, when perhaps the exact distinction can be pointed out.

Lord St Leonards[1] says: "It seemed to the writer to be settled, after much previous conflict of opinion, that the plea would prevail against a legal as well as an equitable claim. Upon principle this would seem to be clear. Equity may not be able to interfere with the legal estate in favour of a purchaser, but still it will allow him to defend himself against a claim under it. It will not assist the legal claimant against the purchaser without notice. *It regards not the quality of the estate, but the character of the person.*"

And Romilly, M.R.[2]: "If the suit be for the enforcement of a legal claim, or the establishment of a legal right, then, although this court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy or an equitable right, which can only be enforced in this court, I have not found any case, nor am I aware of any, where this court will refuse to enforce the equitable remedy which is incidental to the legal right."

Now, the position of matters where the legal estate is set up against prior equities is in truth very different. There

[1] Sug. *V. & P.* 14th Ed. 791.

[2] Colyer *v.* Finch, 19 Beav. 500, 509 (1854).

"such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this court[1]." The plea of *bona fide* purchaser, as has been seen, does not go to the jurisdiction. And Lord Hatherley puts the position as regards the legal estate in equity thus[2]: "The whole doctrine of this court about the protection afforded by means of the legal estate is simply this: A party getting the legal estate acquires no new right in equity in any way. But, equity, regarding all the persons who have incumbrances according to their priorities, considering that the equitable interests pass, just as the legal interest does, by the effect of the deeds, finds itself checked at times, and an obstacle thrown in its way by an incumbrancer's saying, 'I have got the legal estate interposed; I insist it is mine at law, and there must be a superior equity shewn in order to deprive me of my legal estate.' It is merely staying the hands of the court, by resting on that legal estate which this court will not deal with, unless a superior equity can be shewn; and although the court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrancers, as to enable a person who has an anterior charge to wrest the legal estate from the person who has obtained it without notice of the anterior charge, and who has not parted with it. That is the whole effect of the doctrine, and none other."

Taking the first part of Lord Hatherley's remarks alone, it would be easy to understand a confusion. The court will not deal with the legal estate unless a superior equity can be shewn. But in most cases unless the legal estate is in the hands of a *bona fide* purchaser without notice, or of a person who is in the position of such a purchaser, a superior equity usually will in fact easily be shewn. The protection of the plea is thus often needed to exclude it, but that is all, and once any superior equity be excluded the *vis inertiæ* of the legal estate will automatically assert itself against the jurisdiction of the court to enforce any equities (including equitable estates) whatever

[1] James, L.J., in Pilcher *v.* Rawlins, 7 Ch. App. 259, 268.

[2] In Rooper *v.* Harrison (Page Wood, V.C.), 2 K. and J. 86, 108 (1855).

against it. This is clearly a far wider effect than that of the plea by itself, in bar merely of the exercise by the court of certain powers which it admittedly possesses—in bar of the theoretically discretionary equities, and the last sentence of Lord Hatherley's remarks brings out the distinction strongly. For in the plea of *bona fide* purchaser equity "regards not the quality of the estate but the character of the person," and the anterior equitable incumbrancer may well himself also be a purchaser for valuable consideration without notice. He then is equally entitled to the "shield" of that plea, in accordance with the principle stated by Lord St Leonards above. So far therefore as the plea goes, equity will interfere with neither—the equities are equal, and "where there are equal equities the first in time shall prevail." But, as clearly appears from this latter part of Lord Hatherley's dictum, it does not prevail in one case, namely where the later incumbrancer has "got the legal estate interposed": this circumstance is something different, it is another factor, and leads to a different result. It introduces that other and very different principle, namely, "where there is equal equity the law shall prevail." Equal, that is, except in point of time of creation, for this is not an equity strong enough to outweigh the legal estate.

To summarise the matter, the priority of the legal estate rests on the basis of the absence of an equity strong enough to give jurisdiction to the court to interfere with legal right: the plea of *bona fide* purchaser is but to shew cause why the court should not exercise in certain directions a discretion admittedly within its powers. What equities will give jurisdiction to interfere with legal right on the one hand, and what equities will on the other hand move the court to abstain from exercising these powers are questions that should be kept entirely distinct, the more so because the two principles are so often found working in combination (as will presently further appear), and because some common ground, such as notice and the like exists in both cases; and these facts may very easily lead to mis-citation[1].

[1] An instance of such confusion perhaps occurs in *Wh. & T. L. C.* 7th Ed. II. 167, where it is said: "The cases of Phillips *v.* Phillips and other cases, shewing that the doctrine of purchase for value will not be applied to give priority as

The plea of *bona fide* purchaser only concerns the question what equities will or will not move the court to exercise a jurisdiction it admittedly has but which it will not always choose to exercise.

To turn now from these general considerations to Lord Westbury's second class of cases—those concerning the obtaining and tacking of a *tabula in naufragio*. It would seem that this is in fact a matter with which the plea is concerned, though the point has been doubted by some and though the class seems too narrow. The doctrine of equity which accords priority to the legal estate would, without the assistance of that other doctrine involved in the plea of *bona fide* purchaser, be insufficient to secure the result, not only in the case of tacking but in every case where the legal estate is set up against an equity prior in point of date. In the first place, in tacking, the fact that the legal estate had been acquired after notice of that equity would be fatal. Notice at once gives the court jurisdiction to deal with the legal estate according to its own equity; and its equity is to allow priority only according to order of time. The fact of notice would at once provide a force which would overcome the *vis inertiæ* of the obstacle thrown in its way. Again, as the destructive force of the legal estate rests solely upon absence of jurisdiction, that doctrine is not concerned with the question of valuable consideration having been given: but the fact that the puisne interest was acquired for valuable consideration is of the essence of tacking.

It is usual vaguely to put forward the *tabula in naufragio*

between owners of equitable estates, are strongly disapproved by Lord St Leonards"—citing Sug. *V. & P.* 14th Ed. 798. A reference to the passage cited shews however that it was far from his mind to advocate an extension of the doctrine of the priority of the legal estate in the hands of a purchaser for valuable consideration without notice so as to give a like priority to an equitable estate in the hands of such a purchaser (against presumably a volunteer). All he there contends for is that the plea should be available in favour of a *bona fide* purchaser not only against "an equity as distinguished from an equitable estate" (in Lord Westbury's third class), but against an equitable estate as well. He would enlarge the sphere of the plea, that is all. It would be very unfortunate if his great authority were supposed not only to approve but to advocate an extension of the doctrine of the destructive operation of the legal estate to a like operation of equitable estates.

as a consequence of the doctrine of the priority of the legal estate over equities, but it is more difficult to attempt an explanation of how that doctrine brings about the phenomenon of tacking. In some mysterious way the "superior force and strength" which equity allows to a *bona fide* purchaser without notice and having a legal title against an equity (including an equitable estate) is supposed to enable a puisne equitable estate when supported by a legal estate subsequently acquired, and after notice, to triumph over the intermediate estate. And this intermediate estate may be either legal or equitable[1].

It is usual to cite as a sufficient explanation of the doctrine of tacking, the well-known passage of Lord Hardwicke in Wortley *v.* Birkhead[2]. As an explanation of the matter it is however quite insufficient. This is the passage:

"As to the equity of this court, that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisny taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general; and was so in Marsh *v.* Lee by a very solemn determination by Lord Hale, who gave it the term of the creditors' *tabula in naufragio*: that is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and, I believe, was rightly settled: but rightly settled only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different courts, and creates different kind of rights in estates; and therefore as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, this court never thought fit, that by reason of a prior equity against a man, who had a legal title, that man should be hurt; and this by reason of that force this court necessarily and rightly allows to the common law and to legal titles. But if this had happened

[1] See cases cited in next chapter.

[2] 2 Ves. sen. 571, 573 (1754).

in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est jure*, must hold. This has gone so far, (and the original case was) that if a puisny incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit; for in Marsh *v.* Lee there was a *lis pendens*, yet was not the party affected with it; and so, I take it, in general it would be notwithstanding a *lis pendens*; because the principle, upon which all these cases depend, is this, that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion, that shows the necessity of it. It is only notice at the time of taking in the third, that will affect him; for then no act, he can do, will help him." Now great is the respect in which the present writer holds Lord Hardwicke, in whose mind the fundamental principles of equity were very clear, too clear perhaps, sometimes, unfortunately for us, to require detailed enunciation; and very unerringly did he apply them. The eloquence of Coke in his celebrated panegyric of Littleton might almost indeed be repeated of Hardwicke. "Certain it is," wrote Coke[1] of his Master, "that there is never a period, nor (for the most part) a word, nor an &c., but affordeth excellent matter of learning"; and he added a crushing denunciation of "such as in words have endeavoured to offer him disgrace, never understood him." It is at the risk of seeming to deserve some such denunciation for misunderstanding Lord Hardwicke, that this passage is not accepted here as a sufficient account of tacking; and notwithstanding that the contrary assumption is generally made without question, though not always in accordance with better judgment[2]. A more detailed explanation will now be attempted with the plea of *bona fide* purchaser as the key of the puzzle.

As has been seen, the fact of notice would at once present an

[1] Co. Litt., *Proœmium*.

[2] Mr Justice Story, *Equity Jurisprudence*, Ed. 1892, 270, cites part of the above passage from Lord Hardwicke, but is evidently dissatisfied; he says: "The account of the matter given by Lord Hardwicke is probably the true one. But it is a little difficult to perceive how the foundation could support such a superstructure."

equity which would overcome the *vis inertiæ* of the obstacle presented by the legal estate. What is wanted then to enable the puisne interest to retain the benefit of the legal estate brought in, is a shield to protect that obstacle from being removed. Let us see whether the plea will supply such a shield, so as to bring about the peculiar case of tacking. And further, if it will, why in that case the legal estate should come into the matter at all, as of course it undoubtedly does.

Take first a simple case, the ordinary one of the purchaser for valuable consideration of a legal estate and being at the time of his purchase without notice of a prior equitable interest. Suppose such a purchaser is brought into equity by the party entitled to that prior equitable interest, having, that is, an equity to interfere with the legal title. The owner of the legal estate is in a position to use the shield of the plea of *bona fide* purchaser. He will say, "I purchased the legal estate without notice of your equity." The court can then claim no jurisdiction over the legal estate, for the plea brings forward an equity itself as good as that of the plaintiff, and, as it were, cancels it. As Lord Hardwicke puts it, "there is a legal title and equity on one side; on the other only a prior equity." The result is that the legal estate is left to exercise its over-riding effect. The mere non-interposition of the court to enforce the plaintiff's equity brings about that result[1]. It is in this way that the shield of the plea works whenever the protection of the legal estate in the hands of a *bona fide* purchaser without notice is obtained; and Lord Westbury's second class seems too narrow accordingly, for it is confined to the case of the *tabula.*

[1] On this basis of the matter, it would, by the way, seem in accordance with principle that the onus of proof of jurisdiction should rest upon the party who wishes to shew it, and it should rest therefore on the party attacking the legal estate to shew facts upon which that jurisdiction may be founded; the ordinary circumstance would be that the owner of the legal estate acquired it with notice; and that appears formerly to have been the rule as to the onus of proof; *Ex parte* Hardy, 2 Deac. and C. 393 (1832). The contrary rule however seems now to obtain and the onus is said to be on the person who alleges no notice; A. G. *v.* Biphosphated Guano Co., 11 Ch. D. 327, 337—C. A. May not this be another instance of confusing the plea and the doctrine of the legal estate? In the later case the onus should fall on the party setting up the legal estate only when he has to meet the equal equity of a *bona fide* purchaser who has proved his position, and so that the legal estate may be left to prevail.

Now, to take the matter a step further—into the realm of the *tabula in naufragio*. Suppose it has appeared that one having the legal estate had in fact acquired it with notice, and that the court has jurisdiction accordingly to deal actively with that legal estate upon its own principles. One of those principles is, *qui prior est tempore*, true; but another is invoked in the plea of *bona fide* purchaser—that although the court may have jurisdiction in the matter, it will not interfere[1]. If then the defendant can plead that plea concerning his legal estate notwithstanding that he has actually acquired it with notice, and perhaps not for valuable consideration either, he is safe upon equitable principles themselves. The peculiar case of the *tabula* seems to lie in this, that he is to be allowed this plea for his legal estate, even though it have been acquired with notice, by reason merely of his having previously acquired a puisne estate in the same subject matter for valuable consideration and without notice. On this basis the doctrine of tacking will be so far intelligible. On the basis of the priority of the legal estate alone it will not. If tacking is rightly included in Lord Westbury's second class of cases within the sphere of the plea, its doctrine then must amount to this, that where a person has purchased an equitable estate for valuable consideration without notice he may avail himself of the plea for a legal estate, also vested in him, but concerning which alone he could not plead it. This seems to be the spot upon which one can place a finger and say it is the heart of the doctrine of tacking.

It will be observed that in this view of the doctrine of tacking, the equity of redemption of the mesne proprietor is only so far defeated that it is not to be exercised while the plea of *bona fide* purchaser remains effective. That plea, as has been seen, is available only in right of the puisne estate and so, therefore, if that estate be redeemed, the right to redeem the prior legal estate again revives in the party entitled to the mesne interest. And the mere fact that the plea has become available in right of the puisne incumbrance would give the mesne

[1] See *per* Lord Romilly, *ante*, p. 26.

proprietor an interest entitling him to redeem it[1]. The net result is that the mesne interest is merely postponed to the puisne incumbrance.

It will now perhaps be asked, what has the legal estate to do with the matter? As is well known there must be at least one legal estate—the prior one—in all cases of tacking, while the plea, as has been said, applies also to equitable estates. Why then cannot a prior equitable estate be tacked?—the authorities are clear that there can be no tacking where the legal estate is standing out[2]. The answer perhaps is that the intermediate estate is only defeasible because it carries with it an equity to redeem the prior incumbrance: this equity is, in that sense, itself prior to the legal estate, and it is perhaps merely this equity which is to be defeated by the obstacle of the legal estate raised by the plea of *bona fide* purchaser.

For the purpose of such a theory it would be immaterial whether the intermediate estate were legal or equitable, for the right to redeem must always be equitable. The legal estate could of course operate to postpone an intermediate estate which is wholly equitable, but no distinction in the operation of tacking between the cases of legal and equitable intermediate interests seems ever to have been taken. This fact would appear to lend support to the view just advanced as to the operation of the legal estate, for probably some distinction would be inevitable in any other view.

It will be noticed that the above theory of the basis of tacking involves the position that the prior legal estate must be, not an absolute estate, but one held by way of security only, or there would be no equity of redemption to be barred. The early authorities establishing the doctrine of tacking are not inconsistent with this, and in them the *tabula* seems invariably to have been a mortgage estate or one obtained under a judgment statute or recognizance.

Let us examine now how the plea works out so as to secure the "shield" for the legal estate as is above suggested—to bring

[1] Compare Hall *v.* Heward, 32 Ch. D. 430—C. A.

[2] Brace *v.* Duchess of Marlborough: Clarke *v.* Abbott, *pass.*

about, that is, the position summarised in the maxim, "where there are equal equities the law shall prevail."

The theoretical position seems to be that the equity advanced to interfere with the legal estate is met and neutralised by the plea of *bona fide* purchaser; the impact has been taken by the shield and its momentum is gone. The game of chess will supply another illustration. The defendant's king, the legal estate, is checked, that is, has become subject to the jurisdiction of the court, when he is threatened by the plaintiff's piece, an equity which will give that jurisdiction. But if the defendant should play skilfully he will have ready to guard his king another piece—another interest in the same property, purchased for valuable consideration without notice. As equity will not disarm him of his shield, this other piece is effective and the king, the legal estate, is left free. The equities are equal in this sense, that one has been effective to neutralise the other. All this it will be seen is strictly consistent with Lord Hardwicke's statement of the foundation of the matter; it is plain that the legal estate has the advantage because the puisne incumbrance has been acquired without notice; and that the singular result occurs by reason of the separate jurisdictions of law and equity.

In the abstract, the reasoning above detailed is of course not strictly unimpeachable—for why should both estates have the benefit of the plea concerning one, merely because they are vested in the same person? But it is at any rate as good as in some other cases where a legal fiction has been created to carry into effect a substantial result. It is perhaps sounder than the structure of the common recovery with its thin fiction of warranties, and as good perhaps as that involved in the old ejectment action. As in these cases at common law, so in equity as regards tacking, the great minds of the past may not have been careful to reason too well where good purposes were behind.

In the case of tacking, not only did the separation of jurisdictions lend itself to the result, but the reasoning was easily brought within the common course of procedure of the court. Indeed, the whole idea may well have originated in the

rules of pleading. The ordinary bill for redemption of a legal mortgage was in form an application for an account and for a decree for delivery up of possession of the property and the title deeds[1]. Where the mortgage is not legal there is this essential difference that there is no claim to interfere with legal right, and it is out of that claim that in tacking the whole matter arises. The usual course where the assistance of the court was desired to interfere with legal right was to file a bill in equity stating the equitable title and the anticipated legal obstacle and then to examine the defendant as to his intention of taking advantage of that obstacle; when, if the plaintiff should establish a superior claim to the consideration of the court by shewing a better title, that is, greater equity than the defendant, the court would interfere, and not otherwise[2]. In the usual case the obstacle—that the estate has become absolute at law—is easily overcome by shewing the equitable title to redeem. But in the case of tacking, the plea of *bona fide* purchaser will intervene in this way—let Lord Redesdale explain the machinery[3]: "If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title." And, as the same authority has also stated[4], "Every bill is in reality a bill for discovery," and a bill to redeem a legal mortgage is accordingly one of discovery against the legal title. Now, "If a defendant is a purchaser for a valuable consideration, without notice of the plaintiff's title, a court of equity will not in general compel him to make any discovery which may affect his own title[5]." The bill of a mesne

[1] See form in Van Heythuysen's *Equity Draftsman*, 2nd Ed. i. 401 (1828).

[2] Jeremy, *Equity Jurisdiction*, 287 (1828).

[3] Mitford on Pleadings, 162 (1787). The author afterwards became Lord Redesdale.

[4] *Ib.* 52. How far this may affect the statements alluded to above concerning the plea in case of the auxiliary jurisdiction of the court now said to have become concurrent, it is not here relevant to discuss. The remark cited, it seems clear, is to be taken as applicable to all bills in equity whatsoever; see Beames, *The Elements of Pleas in Equity*, citing the passage, 233 (1818).

[5] *Ib.* 228.

incumbrancer is, however, the very case where the defendant is "not clothed with a perfect legal title," seeing that the title of the defendant to the legal estate which he holds is exceptionable both in the matter of notice and by reason of the existence of a right of redemption. But the defendant is allowed his plea of *bona fide* purchaser, and accordingly the bill against him fails, for, in face of his plea, that discovery cannot be had whereby the fact of notice and of the right to redeem the legal estate on payment of the mortgage money would appear. Upon these facts rests the jurisdiction of the court to interfere with the legal title, and it is just these imperfections in the defendant's title which the plea precludes the plaintiff from setting up.

Behind this technical position came the substantial justice which no doubt the court desired to do. Were the justice of the matter otherwise, it is probable that the procedural position would have been modified accordingly—there was ample scope, if only in deciding the question what was equal equity; and one can scarcely doubt that there was method in the apparent accident in the course of procedure which allowed the plea in right merely of the puisne estate, and a good reason for allowing it. Even in modern times the abolition by statute of the doctrine of tacking produced such an outcry in the legal world that the enactment had to be repealed the next year[1]. It would seem from the journals of the time of this attempt at reform, that the profession thought the security of title to have been greatly shaken by taking away the resource of a *tabula* in case of possible shipwreck[2]. And in the earlier times when the doctrine was first evolved, its substantial utility must have been felt at least as strongly, and strongly enough to outweigh the obvious, at any rate theoretical, injustice to the unfortunate mesne incumbrancer. It was perhaps no mere preference for the legal estate that would cause equity to stretch the point—the court had no need or desire to stretch its doctrine for the benefit of legal right.

[1] Vendor and Purchaser Act, 1874, sec. 7; Land Titles and Transfer Act, 1875, sec. 129.

[2] Another reason was the safety of a first mortgagee in making further advances.

The rational position perhaps lay in this, that before judgments, statutes and recognizances were deprived of their hidden sting by legislation, these forms of security were very frequent and were very easily obtained by any creditor, though perhaps originally unsecured. It must have been a frequent occurrence that a purchaser or mortgagee who had used all diligence in investigating his title would be met after conveyance and payment of his purchase or mortgage money with the claim of a creditor having an actual legal and prior estate obtained by extending one of these securities. The *tabula* then usually was to obtain and extend a still earlier one and tack this legal interest in the land against the other later estate by *elegit*. One can well understand the courts desiring to stretch a point against these old and undiscoverable securities. The trend of modern legislation has been consistently against them and the evil has only in quite recent times at last been effectually checked by the statutory registers[1]. And at the Restoration, when the doctrine of tacking seems first to emerge, the troubled times then past would have resulted in much land being brought into the market, and many creditors of the ruined families of the late period must have existed possessing these securities upon their lands. As against purchasers, such creditors, and secured by such means, can well be conceived as being accounted to deserve but little consideration under the new regime, and possibly it was for protection against them that the doctrine of tacking was first evolved[2]. The doctrine also no doubt occasionally hit such persons as jointuresses or owners of rent-charges, but the claims of these would in normal cases be generally known. The equitable or second mortgage of modern times was probably then an almost unknown security. There was then no such rapid flow of capital nor such opportunities for its

[1] The series of statutes ends with the Act of 1900 and covers over 200 years. That curious and almost forgotten Act, 4 and 5 W. and M. c. 16 (1692), "An Act to prevent frauds by clandestine mortgages," specially enacted that if one should make a mortgage after having confessed a judgment or entered into a statute or recognizance and should not disclose it, he should forfeit his equity of redemption to the mortgagee. See also p. 57 *n.*[4].

[2] The first of the series of statutes referred to in the last note was passed in the same year as and soon after the Act of 1692 there mentioned.

commercial employment as modern commerce has produced, and so but little need for the informal security of a deposit of deeds or for temporary and floating loans. That branch of modern business now carried on by bankers and other institutions probably then had little or no existence. Occasionally no doubt a mortgagee would borrow upon his equity of redemption, but this would hardly be a frequent case; the margin of value of land would scarcely be sufficiently ascertainable before land had become so marketable an asset as in modern times, and to mortgage "up to the hilt" could not have been common. The doctrine of tacking accordingly then often did more good than harm. A purchaser or a mortgagee who after completion is confronted by an old execution creditor whom he had no means of discovering is indeed in a hard case, just such a hard case as was most likely to make bad law[1].

Before leaving the plea, the doctrine of the "right to call for the legal estate," already referred to, may be mentioned again here. It will be seen that this doctrine also stands upon the technical position above outlined. The priority of the legal estate rests, as has been seen, upon absence of jurisdiction. Say that one having the benefit of a legal estate held in trust for him by a nominee or other trustee desires to rely upon that legal estate against a plaintiff who alleges an equity to interfere with it—alleges, say, an equitable title of earlier date, as in the ordinary priority case. The defendant pleads the plea of *bona fide* purchaser concerning, not the legal estate, but his equitable interest in it, his right to call—the plea, it will be remembered, is available to an equitable owner as much as to a legal. The plaintiff therefore cannot touch the defendant's "right to call." But this is the only means by which he can reach the legal estate. To make the trustee a party to the action would not "bring into equity" that legal estate, so long as the defendant could make out no equity to

[1] "If they were right in law, the fact that I am thoroughly disgusted with the railway company for putting forward such a claim would not affect me in the slightest. The importance of making English law clear and certain is so immeasurably greater than any other consideration"; Fletcher Moulton, L.J., in 1910, 1 Ch. 32.

interfere with the trust, for until then the trust would exclude and over-ride all other equities[1]. The only person who can bring the legal estate before the court is the *cestui que trust* or those claiming through him, and he has shielded himself by the plea from any such claim of the plaintiff. The legal estate therefore remains outstanding, and defeats the equity of the plaintiff accordingly.

In regard to the *tabula in naufragio*, the doctrine of the right to call equally here in effect requires the court to proceed as if the legal estate were actually vested at law in the person having the right to call for it. For this there is clear precedent[2]. And the position in principle is not different from other priority cases. "I take it to be the rule in equity," said Lord Chancellor Cowper in Wilkes *v.* Bodington[3], "that where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other." The only doubt might seem to arise by reason of some expressions used in that great case, decided not long after, Brace *v.* Duchess of Marlborough[4]. It was there laid down in general terms, referring to no exception at all, that "the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time; *qui prior est in tempore potior est in jure.*" Lord Hardwicke, in Willoughby *v.* Willoughby[5], however drew special attention to these words and explained that they must be understood subject to Lord Cowper's qualification and distinction that the legal estate

[1] See Taylor *v.* Russell, Ch. v. *post.*

[2] Blake *v.* Hungerford, Prec. Ch. 158 (1701)—Trevor, M.R. The Master of the Rolls spoke of "the common case where a third mortgagee buys in the first mortgage in trust for himself," whereupon he may make use of his trustee's name to defend or recover. Distinguish this from the case where the beneficial nterest is not held in the same right, however; see Ch. v.

[3] 2 Vern. 599 (1707).

[4] 2 P. W. 490, 495 (1728), 7th Resolution.

[5] 1 T. R. 763, 774 (1787).

must be so standing out that the puisne incumbrancer had not acquired the better or preferable right to call for it. And in Clarke *v.* Abbott[1], a case concerning priority between incumbrancers, Lord Hardwicke also made it clear that if the plaintiff had there possessed the legal estate either in himself or in a trustee for him so that he could have brought an ejectment and put the defendants to have been plaintiffs in equity, the case might have deserved consideration; but as he did not so possess the legal estate he was there forced to come into equity himself, and had to submit to a prior right of redemption.

[1] Barnard. 457 (1741).

CHAPTER III

TACKING INCUMBRANCES

"WHERE equities are equal the law shall prevail." Like many of its fellows the legal maxim is true only with a considerable amount of limitation and explanation; it is, like many other legal maxims, but a convenient mode of referring to a certain line of cases or doctrine—a good servant, but a bad master. Its application in reference to the doctrine of tacking is no exception to this.

The leading case upon tacking is of course Marsh *v.* Lee[1]. In this celebrated case, the mortgagor, one English, mortgaged part of his Manor of Wigsel (or Wicksall) to one Burrell for £1000; six years afterwards he acknowledged a statute to Burrell for £800; seven years later again he mortgaged the manor with other property to Mrs Duppa to secure £7000. Finally he mortgaged Wigsel to the defendant Lee, suppressing, as clearly appears from the reports, all the prior incumbrances. Lee afterwards heard of the true position and "by the advice of counsel purchased in" Burrell's two securities—his legal mortgage and his statute. The plaintiff was the executor of Mrs Duppa, and his bill was "to be relieved in the premises." The court, however, unanimously agreed "That the defendant ought not in any sort to be impeached in equity as to Wigsel, but might keep his statute and security on foot to protect his

[1] 1 Ch. Ca. 162, where the proceedings and pleadings are best given; 2 Ventr. 337 (under the not inappropriate heading of "Some Remarkable and Curious Cases in the Court of Chancery"), where the facts and the reasoning of the court best appear; (1670) Sir Orlando Bridgman, Lord Keeper; Lord Hale, Chief Baron; and Rainsford, J.

mortgage." The reasons for the decision as given in Ventris are: that he had both law and equity for him; law by reason of the first mortgage and the (extended) statute; equity—and here is an important matter—"for he having a subsequent mortgage, yet, it being without notice, he ought to be relieved in this court." For this the Lord Chief Baron relied upon a case "adjudged in Camera Scaccarii, in the Court of Equity, since the King came in, in one Shelley's Case." Other cases cited in argument by counsel (Sir H. Finch, afterwards Lord Nottingham, "the Father of Equity") upon the side of the successful defendant were: Higgon *v.* Calamy[1], Churchill *v.* Grove[2], and "Primate and Jackson's case[3]." In the first of these, a subsequent mortgagee having no notice of the prior judgment or of the intermediate incumbrance, a rentcharge, had on hearing of them purchased in the "legal title." It was held that the person entitled to the rentcharge might not redeem this without redeeming the later mortgage. In Churchill *v.* Grove the defendant was entitled to an extended statute; the conusor afterwards mortgaged the property and confessed a judgment (the mesne incumbrances), both to the plaintiff. The defendant, unaware of this, subsequently arrived at an account stated with the mortgagor for the moneys due on the security of the statute; he then took in discharge of the balance due, "an absolute conveyance of part of the extended lands and showed what lands were conveyed to him by the cognizor, and that hereupon he assigned the residue of the extended lands to the cognizor." The plaintiff claimed to set aside the transaction on various grounds and to be allowed to redeem the statute in right of his own mesne incumbrances notwithstanding this purchase (or intended mortgage in fee) by the defendant. The conveyance was however in effect upheld as being a purchase of the legal estate for valuable consideration without notice, and the plaintiff's bill to redeem the earlier statute was dismissed. But the successful defendant's counsel among other arguments, strongly insisted that "it was

[1] 1 Ch. Ca. 149 (1669)—Lord Keeper Bridgman.

[2] 1 Ch. Ca. 35 (1662)—Lord Chancellor Clarendon and Baron Turner.

[3] To be identified with Hedworth *v.* Primate, Hard. 318 (1662).

the constant justice of this court that if a purchaser *bona fide* did buy in an eigne[1] incumbrance, statute or judgment, and there were a judgment or statute mesne between that and his purchase, of which he had no notice at his purchase, that he should protect his purchase with the eigne incumbrance so brought in." It is to be noted that this case was not one of the purchase in of a *tabula* after notice and to protect the puisne estate against the mesne incumbrance. The first incumbrance was purchased by the defendant before this last came into existence at all, and before he acquired his puisne estate, the equity of redemption. In the last of these cases[2], "Primate and Jackson's case," the plaintiff succeeded as tenant-in-tail under a settlement to an estate which was subject to an extent under a statute acknowledged by his predecessor in title, the settlor, prior to making the settlement. This settlement was dealt with by the court on the facts as having been made for valuable consideration. After its date the settlor had again borrowed of the statute creditor, without, it must be assumed, informing him of that settlement, and the creditor and the settlor, upon the further advance being made, agreed that the statute already acknowledged should stand as security also for that advance. The report states that "It was held by Chief Baron Hale and *per totam curiam*, that the plaintiff could have no relief against the penalty of this statute: for both the statute and the settlement in tail, were for valuable considerations, and the money borrowed afterwards raises an equity for the conusee, and the heir has an equity, by reason of the entail: Yet because the conusee" (that is the creditor to whom the statute was acknowledged) "has both law and equity on his side, and the plaintiff has only equity, till the penalty of the statute be satisfied; therefore the plaintiff shall not be relieved, till the penalty be levied according to the extended value, or by casual profits, such as mines, felling of trees, &c." The penalty of the statute (£1500 to secure £800) was probably enough to cover also the further advance, but the amount of this

[1] Eigne = *aîné*, *i.e.* elder or prior.

[2] The writer has up to the present been unable to identify the Shelley's case (also called Medleton *v.* Shelleh) in one of the reports.

is not stated in the report. (The latter part of the judgment by the way relates to a question whether any relief could be had in respect of the interest under a Usury Act in force at the time—the passage must not be mistaken as bearing upon the question of priorities of the securities[1].)

The authority last cited is the earliest in date: it is the ordinary case of a further advance by one having the legal estate, made without notice of an intermediate equity, and in reliance on that legal estate. Such a case in effect is that of a purchaser *pro tanto*[2] of the legal estate without notice. The further advance but amounts to this, that the mortgagee bites a little deeper into that legal estate by thus adding to the condition for its redemption, namely, that the further advance as well as the original debt secured must first be repaid. It is very nearly part of the original purchase or mortgage upon which the legal estate was actually transferred, and it is but a small stretch to deem the further advance in reliance upon the legal estate as having the same effect as if it were made at the time. Very shortly afterwards we hear of a case[3] expressly decided on this footing, namely, that "if the defendant had no notice of the jointure when he lent the money" (that is, by way of further advance), "he must be allowed it"—without any further reason given. The proposition has not been doubted since[4]. It has even been thought in comparatively recent times that if the original mortgage contains an express charge of future further advances, these will be good against intermediate incumbrances of which the mortgagee has notice at the time of actually making them. But this has been determined to go too far[5], though against the opinion of Lord Cranworth.

It will probably have been observed that Churchill *v.* Grove was an analogous case; the person having the legal estate under the prior incumbrance there laid out further money

[1] It seems to have been so mistaken in Viner's *Abridgment*, tit. Mortgage.

[2] The phrase used by Jekyll, M.R., in Brace *v.* Duchess of Marlborough.

[3] Goddard *v.* Complin, 1 Ch. Ca. 119 (1668)—Lord Keeper Bridgman; Blackston *v.* Moreland, 2 Ch. Ca. 20 (1679) is a similar case.

[4] It is laid down in terms by Lord Hardwicke in Morret *v.* Paske, 2 Atk. 52 (1740).

[5] Hopkinson *v.* Rolt, 9 H. L. C. 514 (1861), Lord Cranworth *diss.*

without notice of the mesne incumbrance, and relied upon his legal estate.

The other case, Higgon *v.* Calamy, involves the converse position—that, as in Marsh *v.* Lee itself, of a puisne interest which was acquired without notice of an incumbrance, prior to it, but subsequent in point of time of creation to the legal estate ultimately brought in.

The case of Higgon *v.* Calamy and that of Marsh *v.* Lee have these three points in common, that: first, the puisne incumbrancer thought he was originally getting the legal estate; secondly, he had then no notice of either the prior legal mortgage or of the mesne incumbrance; and thirdly, he acquired the legal estate after notice. One reason why the court may have desired to place him in the position of a purchaser of the legal estate without notice has been suggested above—the rational idea behind the rule of procedure evolved by the court enabling him to plead "purchaser for valuable consideration without notice" so that the mesne is defeated. As has been seen, that rule appears to strain a point and a good reason must be supposed to have existed for so doing.

The first of these common grounds perhaps assists here by suggesting a further equity in the position. By reason of the different jurisdictions and the consequently wide divergencies between legal and equitable right (the "different kind of rights in estates" to which Lord Hardwicke referred) and by reason too of the immeasurably greater value of the legal title (which may not only defeat prior equities but cannot be defeated by another legal title in such a way), one who bargains for a legal title and, by the fraud or mistake of the vendor or mortgagor, does not get it, might well be allowed, within limits, to obtain what he bargained for, if he can. The case of a further advance is not quite so strong as that of the "purchase in" of a prior estate in this, that the person making a further advance had the legal estate all along and had originally acquired it for valuable consideration and without notice. In the Marsh *v.* Lee class of cases, the converse case, he only thought he had it, and though the matter is analogous it is not in this respect strictly converse. But by "a construction in

favour of purchasers" the court is determined to find some means to treat it as converse. As has been already suggested, perhaps then, as subsequently, unknown creditors who had become incumbrancers by extending judgments, statutes and the like, were constant thorns in the side of titles and the courts were probably prepared both to stretch a point of principle and to risk a little injustice in a few cases to secure the protection against them of that favoured individual the *bona fide* purchaser: and just after the Restoration, when the doctrine first seems to emerge[1], financial difficulties among the landed classes must have made the question a somewhat burning one. The citation in Marsh *v.* Lee of Hedworth *v.* Primate is very suggestive here. The idea in that case no doubt was and it might equally be applied in the Marsh *v.* Lee class of cases, that where one thought he was acquiring a legal security for the money advanced but in fact by the fraud or mistake of the mortgagor did not acquire one he is, by "a construction in favour of purchasers," to be deemed nevertheless in as good a position. This, after all, only means, in the Marsh *v.* Lee class of cases, that the rest of the transaction contemplated, that is, the acquisition of the legal security, is permitted to be completed afterwards. It is to be permitted so long as the puisne incumbrancer did not discover the fraud or the mistake until after he had parted with his money[2], and notwithstanding notice received afterwards but before the transaction is complete. Thereupon the acquisition of the legal estate will be deemed to relate back to the date when the tacker supposed he was obtaining it in the first instance. That is to say, the puisne incumbrancer is to be in the same position as if the

[1] There are many such cases in Vernon's and other reports of contemporary cases; see *e.g.* Hitchcock *v.* Sedgwick, 2 Vern. 156 (1690) and cases there cited. One curious case was cited by Lord Commissioner Rawlinson there of a purchaser under a "parliament title, in the late times," being protected after the Restoration by a *tabula*: see next chapter as to this case (Taylor *v.* Tabor).

[2] *Per* Lord Macnaghten in Taylor *v.* Russell, 1892, A. C. 244, 259. And for a good illustration shewing that this is the crucial moment see Tyldesley *v.* Lodge, 3 Sm. and G. 543 (1857), where the countermanding of a cheque handed over on completion, but which countermand was soon after withdrawn, proved fatal by reason of intervening notice.

puisne incumbrance had been what he thought it was, a legal security.

In the case of the further advance there would be no need, to compass the defeat of the mesne equity, for any fictitious enlargement of the duration of the transaction; the further money is advanced upon the credit of the legal estate without notice, and there is an end. The security is not deemed to be a new equity; it is the original legal estate, and that only, and the legal estate has been prior to all from the start.

But this idea of relation back is the rational side of the matter only. The court cannot change the priority of incumbrancers merely at its will without proper technical means. The technical position, the means by which the legal estate came to benefit in effect by the plea of purchase for valuable consideration without notice of the puisne incumbrance has been dealt with in the previous chapter. In arriving at the result the court was probably assisted by the close analogy of the principle of consolidation, if not by that principle itself. This technical position is then in effect that the prior legal incumbrance is withheld from redemption by the mesne until the owner of the mesne interest will also redeem the puisne incumbrance. The doctrine of consolidation is of course ordinarily applied to the case of two mortgages on different subjects of property, but theoretically it would seem as readily applicable to different interests in the same subject of property. The principle is the same in either case. An authoritative statement of the doctrine in its usual application may be cited here, delivered in the Court of Appeal by Cotton, L.J., on behalf of the court (James, Baggallay and Cotton, L.JJ.). The court declared that it is: "the equitable principle that a court of equity would not assist a mortgagor in getting back one of his estates unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a court of equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which

might be of larger amount than the value of the estate[1]." There are two securities for one debt, one must not be redeemed without the other.

The matter is expressly put in this way in the case of tacking in Higgon *v.* Calamy[2]. From the first equity had a free hand to dictate terms in the matter of redemption. The estate at law was gone, and to restrict the right of redemption, was, far from interfering with legal right, but to abstain from doing so; and the doctrine of consolidation rests upon the elastic principle that "he who seeks equity must do equity." This doctrine accordingly would furnish an instrument readily applicable to assist the court in carrying out what was deemed to be equity in the circumstances giving rise to the case of tacking.

If as has been suggested above one of these circumstances was that the tacker, upon acquiring his puisne interest, supposed he was acquiring the legal estate, this fact has apparently been forgotten or overlooked in modern times. Let us look at the older authorities with the point in view.

Second only in importance to Marsh *v.* Lee stands that great case, Brace *v.* Duchess of Marlborough[3]. There the doctrine of Marsh *v.* Lee is laid down formally in the First Rule, thus: "That if a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction

[1] Mills *v.* Jennings, 13 Ch. D. 639.

[2] So also in Bovey *v.* Skipwith, 1 Ch. Ca. 201 (1671)—Lord Keeper Bridgman, where it was resolved, over-ruling two judges, that the defendant should hold both securities until all that was due on both was paid him; and cf. Lord Hardwicke, in Godfrey *v.* Walton, 3 Atk. 517 (1747), where the principle that "a person who comes for equity, must do equity" was applied to enable a judgment creditor to claim interest in excess of the extended value against a mortgagor who came into equity for an account. It is worth observing that consolidation is an equity good against a *bona fide* purchaser: Beevor *v.* Luck, L. R. 4 Eq. 537, so that the mesne would have no defence on this score.

[3] 2 P. W. 491 (1728)—Jekyll, M.R.

is in favour of a purchaser, every mortgagee being such *pro tanto*." The Master of the Rolls added that "though this be settled, there can be no reason to carry it farther, to a case not within the same reason, to a case where the lender of the money does not advance it upon the immediate credit of the land; no precedents go so far."

Hence the Second Rule, namely, "If a judgment creditor, or a creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference." And Lord Eldon said in *ex parte* Knott[1] that the case of Brace *v.* Duchess of Marlborough went upon this; "that a mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land. He has neither *jus in re*, nor *jus ad rem*. But if there is once a creditor by mortgage, and he afterwards advances money upon a judgment, the court will intend, that he makes that advance, meaning to take a security upon the land for both; and he may tack; but if he remains a mere judgment creditor, the court says, he does not deal upon the faith of the land, in this sense, that he does not contract for an interest in the land; and therefore is entitled only, as a judgment creditor, to an *elegit*; and he cannot tack[2]." In extracting principles from the old authorities relating to judgments, now out of use as mortgage securities by reason of modern statutes, it is of course to be remembered that there is a great difference between a judgment which (then) conferred a mere lien and one which having been extended has resulted in an actual legal estate in the land, an estate by *elegit*. In the passage just cited the reference is to unextended judgments, not conferring therefore any legal interest: all the creditor would have by the judgment itself would be the mere right to sue out execution at some future date—he would have as Lord Eldon said neither *jus in re*—an interest in the land, nor *jus ad rem*—the right to call for one. It is intelligible therefore that the special privilege allowed to the purchaser having an equitable interest in

[1] 11 Ves. 609, 617 (1806).

[2] Hacket *v.* Wakefield, Hard. 172 (1660)—Baron Turner, is an early direct decision to the like effect.

the land of obtaining the legal estate as a *tabula* would not be allowed to such a mere right; it is far less like a real right than a right of entry, which as has been seen is not allowed the force of a legal estate.

Jekyll, M.R., in Brace *v.* Duchess of Marlborough, remarks a distinction based on the above reasoning. He says: "So note a diversity where a third mortgagee buys in a statute which is the first incumbrance, and where a statute creditor, &c., being the third incumbrancer buys in the first mortgage; in the latter case the statute or judgment creditor, because he did not lend his money on the credit of the land, shall not unite the first mortgage to his statute or judgment; but in the former, as the land was in the view and contemplation of the lender, he shall be allowed to unite the statute to his third mortgage."

So prominent is this factor of the faith of the land that a lender having the legal estate and making a further advance has the advantage of a special presumption of the court that he means the legal estate to be a security. And so it has been held even where in fact he expressly made the advance upon another security, namely, a subsequent judgment[1]. The security of the legal mortgage will then be good against another incumbrance intermediate between the two; namely, the intermediate incumbrancer must redeem both. It is but a slight extension in the direction of a very reasonable presumption of intention. Probably it was to this point that Lord Hardwicke referred when he said, in a passage otherwise somewhat difficult to follow: "It would be very hard, if the defendant should be in a worse condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be in this court." It is only on this assumption, that the advance was made on the faith of the land, that the mortgagee is to be in as good a position as if he had expressly advanced the money on his legal mortgage.

On the same principle of the faith of the land, a loan upon

[1] Smithson *v.* Thompson, 1 Atk. 520 (1739)—Lord Hardwicke. Compare Lord Eldon above, "...and he afterwards advances upon a judgment, the court will intend," &c. And Halliley *v.* Kirtland, 2 Ch. Rep. 360 (1685), seems a similar case. Compare also Demandray *v.* Metcalf, Prec. Ch. 419 (1715), for a like presumption upon a further advance by a pledge of chattels.

the security of a contract for the sale of land cannot be tacked to a legal estate in that land because an interest, real or supposed, in the land is not the basis of the transaction.

So too, a loan upon the security of an equitable interest. For in what respect is an equitable charge a better interest in the land, than the lien of an unextended judgment? It is rather less in fact, for a judgment gives a right to sue out execution, that is, to obtain a legal estate and to be put in seisin: an equitable interest falls far short of this[1]. Yet this lien of the judgment creditor, as has been seen, cannot give rise to a claim to tack. The reason is stated very clearly by Lord Hardwicke in Morret *v.* Paske[2]: "The reason why a mortgage may be tacked to a judgment, is this, because the judgment creditor, by virtue of an *elegit*, may bring an ejectment, and hold upon the extended value, and as he has the legal interest in the estate, the court will not take it from him." And so Lord Eldon speaks in Wallwyn *v.* Lee[3] according to this reasoning, in terms which involve the supposition that it rests upon the notion of the *tabula* having been an essential factor in the security for which the puisne incumbrancer had dealt. He says: "Is it not worth consideration, whether the very principle of this plea is not this: 'I have honestly and *bona fide* paid for this, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril, in which you state I have placed myself in the article of purchasing *bona fide*.' Is it not worth consideration, whether every plea of purchase for valuable consideration, without notice, does not admit that the defendant has no title. If he has a good title, why not discover? I apprehend, there is sufficient ground for saying, a man, who has honestly dealt for valuable consideration, without

[1] In one sense an equitable interest may be said to stand higher: it may be a charge on specific land while the lien is but general (see Anon. 2 Ves. sen. 662 (1755)): but an equitable floating security would be equally general and there seems no reason to suppose a distinction arises here as to specific and general equitable charges.

[2] 2 Atk. 53 (1740).

[3] 9 Ves. 24, 33 (1803). That an unexecuted judgment constitutes an equitable lien, see Bristol *v.* Hungerford, 2 Vern. 525 (1705)—Lord Keeper Cowper.

notice, shall not be called upon by confessions wrung from his conscience to say, he has missed his object in the extent, in which he meant to acquire it." And tacking does in fact seem in all the old authorities to be limited to protecting dealings upon the credit of legal interests only.

An illustration strongly bringing out this rational (apart from the technical) side of the matter, is furnished by Huntington *v.* Greenville[1], seemingly a curious case of incumbrancers scrambling for a derelict estate. There the plaintiff had purchased the earlier incumbrance, a satisfied extended statute, apparently thinking that no one existed who had a right of redemption, but the defendant subsequently appeared with a later statute. The plaintiff accordingly, disappointed of his hope to obtain in effect the estate in that way, thereupon bought in the fee simple and claimed to tack it as against the subsequent statute which had thus become mesne. But Serjeant Maynard, counsel for the defendant, put it to the court that: "there was a great difference where a man was first a real purchaser without notice, and then finding incumbrances to arise upon his estate, there, when he was fast and once in, it was lawful for him to get in what ancient securities he could to corroborate and protect his purchase: but this is quite another case, for here the plaintiff had bought in this statute at least two years before his purchase, and so it could not be said to be done for the protection of his purchase." And the Lord Chancellor refused to allow him to tack.

The position however has to be made good by technical means. The rational idea alone is not enough, and from the technical side it does not seem possible to say that the legal estate only enters into the matter in this way. The *vis inertiæ* of the legal estate introduced, in the manner explained in the last chapter, by the plea of *bona fide* purchaser, is still needed to prevent the mesne redeeming the prior legal mortgage by itself. That plea would be ineffectual if brought forward, not concerning the legal estate, but concerning the equity arising under this position of the faith of the land, this equity of

[1] 1 Vern. 49 (1682)—Lord Nottingham.

consolidation. Such an equity, even though held by a *bona fide* purchaser, is but an equity and subsequent in time to that of the mesne. The administrative jurisdiction of the court in matters of redemption can hardly have preserved so wide a discretion. Besides, the mesne too may equally be a *bona fide* purchaser.

The basis then of tacking was rightly stated by Lord Hardwicke in his famous passage. It is "that force this court necessarily and rightly allows to the common law and to legal titles," but it is the basis only. It merely enables the court to extend its principles of redemption to the undoing of the mesne incumbrancer when the aid of the legal estate is obtainable. He who seeks equity is required to do equity in the sense of redeeming also the puisne incumbrance notwithstanding that the legal estate was obtained with notice, or not for valuable consideration—in certain circumstances. These are that the holder had advanced his money without notice and on the faith of having that legal estate but had obtained some lesser interest. No such consideration occurs to give a like benefit to the holder of a merely equitable prior mortgage: there is no tacking as between equitable incumbrances[1], for rational as well as for technical reasons.

Mr Justice Story has said[2], in reference to the "diversities" as to tacking judgments: "It cannot be denied, that some of these distinctions are extremely thin, and stand upon very artificial and unsatisfactory reasoning." But perhaps the faith of the land in the sense above indicated would have caused the distinctions to appear to him somewhat more intelligible, and intelligibility is not without its importance. There is danger in regarding the doctrine of tacking as but an arbitrary technical rule without a rational basis, in this, that such a view may lead to a disregard of its limitations. The maxim that "where equities are equal the law shall prevail" then becomes the only guide and one likely to be applied indiscriminately: it has ceased to be the servant and has become the master. The courts constantly lay down that the doctrine of tacking is not

[1] Clarke *v.* Abbott, Barn. 457 (1741)—Lord Hardwicke.

[2] *Equity Jurisprudence*, Ed. Grigsby (1892), 270.

to be extended further than the decisions compel, and it is submitted that these do not seem to compel an application of the doctrine to the case of an advance upon the faith of a mere equitable interest. It may be true that equitable proprietary interests tend to become more and more like legal interests, but still they are in theory wholly different and the distinction has not yet been lost sight of altogether. Again the doctrine of consolidation, in its more recognised sphere of securities upon different estates in the physical sense, has been severely restricted to its bare established limits[1], and even in that sphere it has been discouraged, too, by the legislature[2]. If its application be recognised in the sphere of different estates in the legal sense, and if, as has been contended above, such an application is the backbone of the doctrine of tacking incumbrances, the restrictive tendency might be felt in this sphere also. It will be pointed out directly how also in another direction than that just indicated the tendency of modern judicial authority seems to be unwittingly to extend the doctrine of tacking beyond the limits ordinarily allowed to that of consolidation: the allusion is to the tacking of legal estates held *en autre droit*.

In one direction, an extension for which there is comparatively modern precedent must be regarded as to some extent justifiable, namely where an advance is made upon an equity of redemption. There the incumbrancer deals for the right to redeem, that is, the right to obtain a conveyance of the legal estate, and in this sense accordingly he may fairly be said to deal on the faith of the land. Thus when he afterwards discovers that there is an interest intermediate between him and the legal estate he may obtain the legal estate notwithstanding[3].

[1] See Sharp *v.* Rickards, 1909, 1 Ch. 109.

[2] Conveyancing Act, 1881, sec. 17. According to the contention here advanced the difference of a few words in that section might (with the help perhaps of a decision of the House of Lords) have put an end to the whole doctrine of tacking incumbrances. But the section is worded only to apply to properties different in the physical sense.

[3] Spencer *v.* Pearson, 24 Beav. 266 (1857)—Romilly, M.R. This is, however, one of the very few authorities for the proposition, and it was strenuously argued there that the money was not advanced upon the faith of the land; but the Master of the Rolls treated it nevertheless as an ordinary case of tacking.

That the case is an extension however would seem probable, by analogy to the earlier refusal of the courts to allow a judgment lien the resource of the *tabula*, though equally there the creditor had a right to obtain a legal estate by extending the land under the judgment. It is to be noted that for the puisne incumbrancer to get in the legal estate does not mean that he merely exercises his right of redemption. The duty of the first mortgagee is to accept payment from the prior incumbrancer of the equity of redemption and to reconvey to him[1]: which means that the puisne must get a transfer of the first mortgage just as in other cases of tacking. In the words of Sir William Grant[2]: "The law of this court gives a person, who has obtained a mortgage of the equity of redemption, this chance; that he may get in the legal estate, if he can; and if he does get it in, the legal estate being united to his equity of redemption, he would have a priority over all the mesne mortgages."

An intermediate stage in this extension perhaps occurred in the case of the legal estate being obtained in pursuance of a covenant or undertaking given at the time of the advance. The ordinary deposit of deeds with a memorandum containing the usual undertaking to execute a legal mortgage is an instance. Subsequent notice but before the undertaking is fulfilled will not prevent the incumbrancer obtaining the legal estate and tacking it[3]: the circumstance comes near to giving that "right to call for the legal estate" which is tantamount to actual possession of it[4]. An instance occurs of such a case as early as 1742 before Lord Hardwicke[5], where the plaintiff held a note for money lent given in the following terms: "Received of my brother Mr Thomas Matthews £450 to be secured by mortgage on my Stoke Hall estate." The plaintiff held also two other

[1] Smith *v.* Green, 1 Coll. C.C. 555 (1844).

[2] In Barnett *v.* Weston, 12 Ves. 130 (1806).

[3] *Ex parte* Pettit, 2 Glyn and J. 47 (1825)—Vice-Chancellor's court.

[4] Garnham *v.* Skipper, 55 L. J. N. S. Ch. 263 (1885)—North, J., however decides that it does not confer it, and so the legal estate must in fact have been obtained. The only case where a legal estate not actually brought in is where there is an express trust of it giving the strict "right to call," of the application of which principle in tacking Blake *v.* Hungerford, Prec. Ch. 158 (1701), is an instance.

[5] Matthews *v.* Cartwright, 2 Atk. 347.

notes in similar terms, and, discovering an earlier charge, he gets in a prior legal mortgage, which he is allowed to tack, Lord Hardwicke saying: "I am of opinion here is nothing in this case which is different from the common one of a first, second and third mortgagee, where the last, after having notice of a second mortgage, prior in time to his own, buys in the first incumbrance to protect himself; in that case the second mortgagee shall not redeem without paying both first and third mortgage." He accordingly decreed that the second mortgagee should not redeem the prior mortgage without also paying off the notes. No objection in regard to the faith of the land is reported as having been taken in argument.

But at these points authority and principle seem alike to demand that the application of the doctrine of tacking should be recognised to end. That Peacock *v.* Burt[1] should be as it seems to be, generally regarded as the modern authority for the whole principle of tacking[2] is an instance of the danger just mentioned. It is in fact but an instance of one of these exceptional cases, for it was a case of a further advance made by an incumbrancer upon the faith of his being given a transfer of the legal first mortgage. Cited for the general proposition, it would go far to establish that every incumbrancer upon an equitable estate is entitled to the privilege of the *tabula.*

It would be singular were the courts to extend the doctrine of tacking unnecessarily. They have expressed, almost throughout[3], the strongest disapproval of it. And it would appear that a reasonable basis for the doctrine can no longer exist save on the assumption of mesne incumbrancers being entirely undeserving of consideration[4] or negligible in quantity, assumptions that cannot now (whatever may have been the case in the past)

[1] L. J. N. S. 33 (1834)—Pepys, M.R.

[2] See *per* Lindley, L.J. *pass.*

[3] See for a very early example, Lord Keeper North in Edmunds *v.* Povey, 1 Vern. 187 (1683), who spoke of "the unreasonableness of this practice."

[4] It was evidently on this ground that the doctrine of tacking has been referred to in a work dating from before the modern legislation against judgment debts as "that ancient resource from the consequences of fraud, that *tabula in naufragio*, as it has been denominated, which has sometimes been considered one of the chief benefits arising from the administration of law and equity in separate and distinct tribunals"; Jeremy, *Equity Jurisdiction* (1828), 289.

any longer be made. Take the attempt to place it upon rational grounds made by Lord Keeper Henley (afterwards Lord Northington) in an early case[1]. He explains the principle of doctrine thus: "For the third mortgagee having innocently lent his money without notice of the existence of the second, has in conscience as good a right to receive the whole money he has lent, as the second mortgagee has to be paid what he may have advanced, and then, by the assignment of the first mortgage, and the possession of the title deeds, he gets both law and equity on his side"; and against that a court of conscience[2] will not interpose to strip him of his protection..."it is by the lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for his protection till his debt is in danger of being prejudiced[3]...as the honesty of the debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced."

The second mortgagee, however, too, what if he have an equal right in conscience to be paid what he has advanced? And as regards the "honest creditor" who thus protects his debt, and the person transferring the legal estate to him for the purpose, modern opinion is likely to share the doubts of Lord Eldon as to the honesty of the transaction and to say with Jekyll, M.R., in Brace *v.* Duchess of Marlborough[4]: "Though the rule of equity has been so settled, it is not however without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money, that the land was of sufficient value to pay the first mortgage, and also his own; to be defeated of a just debt, by a matter *inter alios acta*, a contrivance betwixt the first mortgagee and the third, is great severity; but

[1] Belchier *v.* Butler, 1 Ed. 523, 529 (1760).

[2] "This *Great Sanctuary* of *Plain Dealing* and *Honesty*"—Preface to Cases in Chancery (1697).

[3] It will be noted that this sentence lends some support to the suggestion above advanced that the theory of tacking contains the notion of a fictitious enlargement of the duration of the transaction.

[4] 2 P. W. 491, 492 (1728).

this has been settled upon solemn debate in a case 2 Ventr. 337, Marsh *v.* Lee, wherein that great man Sir Matthew Hale (then Chief Baron) was called by the Lord Chancellor to his assistance." Lord Blackburn[1] referring to this passage has said: "Yet notwithstanding these, as it seems to me, unanswerable objections to the rule, he considered it established. And in Wortley *v.* Birkhead[2] Lord Hardwicke intimates, I think pretty plainly, that if it were then to be settled for the first time he would have decided the other way, but that it was settled[3]... and now, after the lapse of nearly a century and a half more, I think only the legislature can do away with this rule." And Lindley, L.J. (in a case having reference to the responsibility of a mortgagee towards his inferior incumbrancers for surplus proceeds when he concurs with the mortgagor in a sale)[4] has said: "Then another argument was addressed to us based upon Peacock *v.* Burt[5] and that class of cases, which have established the law as stated by Lord Justice Cotton; but in my opinion, they are cases which certainly ought not to be extended. Peacock *v.* Burt looks very like a conspiracy between the first and third mortgagees to cheat the second, which cannot be right. That, however, is the aspect which many of the old cases on the subject bear; still, I am not at liberty to question those decisions, for, although they are opposed to my ideas of morality, they are nevertheless law. However, I am not going to make them the pretext for doing further wrong."

Having regard to the basis of tacking according to Lord Hardwicke and according also to the more complete account of the doctrine here attempted, it would seem to require some explanation why the whole doctrine, together with that of the superior force of the legal title, has not disappeared entirely

[1] Lord Blackburn in Jennings *v.* Jordan, 6 A. C. 698, 715.

[2] 2 Ves. sen. 571 (1750).

[3] Compare Lord Hardwicke's doubts about consolidation; *ex parte* King, 1 Atk. 300 (1753).

[4] West London Commercial Bank *v.* Reliance Permanent Building Society, 29 Ch. D. 954, 963.

[5] 4 L. J. N. S. 33 (1834)—Pepys, M.R. This was a case of a further advance upon the security of the first mortgage, but is usually regarded as a modern authority for tacking generally.

now that the Judicature Acts have put an end to the separation of the tribunals in which law and equity were formerly administered. The explanation seems to be that the courts have not so treated the change effected by those Acts. Even the 25th section of the Act of 1873, subs. 11, has not brought this about[1]. The position seems to be, not that the courts of law as such have now to administer equity as well as law, and *vice versa*, giving by reason of this subsection, a preference to equitable rules in case of conflict or variance, but rather that the court on each "side" is to act when occasion requires also as a court on the other side. There is no merger in the technical sense of that term and both the jurisdictions are alive and separate still, though their law (with the aid of a new code of procedure) may be applied in either division.

The habit of reliance, too, upon precedent engenders an independence of the foundation of a doctrine which would tend to the survival of that doctrine even if its foundations were in fact removed. Based originally upon reason perhaps, it becomes in due course a doctrine founded certainly upon decisions; and so the doctrine of "Peacock *v.* Burt and that class of cases," the doctrine that "has been settled upon solemn debate in a case 2 Ventr. 337, Marsh *v.* Lee," must stand until a superior tribunal has over-ruled those decisions, or until the legislature has abolished the doctrine so resting upon them.

[1] See *per* North, J., in Manners *v.* Mew, 29 Ch. D. 725, 735.

CHAPTER IV

TACKING ABSOLUTE ESTATES

THE next enquiry is whether the doctrine of tacking is applicable where the mesne incumbrancer or owner—after the convenient fashion of the old books, he may be called the "mesne" simply—has no equity to redeem the two estates to be tacked or one of them. And if so upon what principles.

In the last two chapters an attempt has been made to account for the doctrine of tacking incumbrances upon elementary principles and rules of procedure. That doctrine however rests at the present day upon the firm rock of established precedents. Most of these have been mentioned. And there is definite authority that outside the actual decisions the doctrine is not to be applied at all. The suggestions, then, put forward above to explain the tacking of incumbrances can scarcely claim to be anything much more useful than historical speculation can claim to be. But in the case of tacking otherwise than as between incumbrances there is a singular dearth of established precedent. Here therefore the enquiry becomes of practical importance, for if any general principles can be deduced from the numerous decisions concerning incumbrances, those precedents can perhaps be applied to this other case as being one *in consimili casu*—upon the classic principle[1].

From what has been said and still remains to be said it will probably be recognised that the distinctions and anomalies which arise upon the authorities are far too numerous to admit of our accepting as a rule of law in itself the maxim "where

[1] 13 Ed. I. Stat. 1, c. 24 (Westminster II).

the equities are equal the law shall prevail," and so disposing of the whole matter, quite apart from the inadequacy of the explanation of tacking which it offers. It is in fact at least disputable whether that wicked old maxim is to be taken more seriously than most of its fellows. Legal maxims are, as has been well said[1], "the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions, and they are therefore much too absolute to be taken as trustworthy guides to the law."

Putting aside then, this maxim as a guide, the question is whether the precedents for tacking incumbrances (with such other authority as there may be), will serve the further turn of establishing the doctrine of tacking as applicable in other cases. In considering this, the principles apparently underlying these precedents must be recalled again for a moment.

If, as has been advanced, the foundation principle is the plea of *bona fide* purchaser, that principle is evidently applicable in either case—the legal estate where it applies is outside the jurisdiction of the court of equity. But as has been urged, some means is needed whereby the puisne estate derives benefit from the plea of *bona fide* purchaser and whereby that estate is so connected to the legal estate that it may as it were step past the intermediate interests and stand in the shoes and have the priority of the legal estate. In the case of incumbrances the suggestion has been made, and there seems a fair show of reason and authority for the proposition, that this means consists of an application of the general principle of consolidation. With this principle ready to hand, the court has made bold to extend the plea of *bona fide* purchaser so as to cover both the incumbrances tacked. Such a principle could scarcely apply however where irredeemable estates are concerned, and the question must therefore now be whether within the reasoning of the precedents relating to tacking incumbrances some other principle can be found that will do

[1] Salmond, *Jurisprudence*, 2nd Ed. 482.

duty in its place. Without such a principle the doctrine of tacking so far as concerns absolute estates would seem altogether too arbitrary an extension of equitable doctrine, and it must therefore fall to the ground, unless indeed that application of the doctrine can be based upon the direct authority of precedents actually in point.

Perhaps the first reported case which looks like an actual precedent for tacking a first incumbrance to a puisne absolute estate occurs in 1675 before Lord Keeper Finch[1]. Here is the whole report—it is a model of brevity:

"Purchaser of land incumbered with two statutes purchaseth in a precedent statute, having no notice of the second statute. Lord *Keeper*. If he had no notice of the second statute before he was dipp'd in the purchase, he shall defend himself by the first statute, whether the same were paid off or no, if he can at law do it, equity shall not hurt him." The report is thus not clear as to whether the purchase referred to by the Lord Keeper was of the statute or of the land; if the former the position is no more than that put by counsel in Churchill *v.* Grove.

Another case is cited in the judgment of Lord Commissioner Rawlinson in Hitchcock *v.* Sedgwick[2], a case occurring in 1690: "Taylor and Tabor, where the defendant in the late times having purchased under the parliament title, after the restoration of King Charles II, purchased in an old statute, and this court would not relieve against the purchaser." The nature of the mesne interest is not stated; it is of course quite possible that the "purchaser" here was merely such in the sense of having himself also purchased a statute or of having obtained an assignment for valuable consideration of some other incumbrance, which the mesne could have paid off had he wished.

Then in 1829 a case occurs in the Vice-Chancellor's Court of a lessee who when threatened with ejectment by title paramount to that of his lessor, purchased in a satisfied term itself prior to that title, and was allowed to protect himself by it[3],—and this seems a clear case in point, though in an inferior court.

[1] Anon. 2 Ch. Ca. 208.

[2] 2 Vern. 156, 160.

[3] Goleborn *v.* Alcock, 2 Sim. 552.

It seems a long stage, if there is but this one undoubted halting place, from the Restoration, when tacking is first heard of, to 1894, when the case of Bailey *v.* Barnes[1] was decided. This case now stands as the "modern instance" supporting the application of the doctrine of tacking otherwise than as between incumbrances. It must surely be supposed that more than one such case would have appeared in the books were this application of the doctrine of tacking open to absolute owners or were it even regarded as possible. But further instances are at any rate difficult to find—and none were in fact cited in Bailey *v.* Barnes. True, the words "purchaser or mortgagee" occasionally occur in the early judgments, and the mortgagee is called a purchaser *pro tanto*. This last phrase however seems only to touch the matter upon the point of what is valuable consideration; and so also the expression "purchaser" perhaps refers merely to the principle of the plea as excluding the jurisdiction of the court in reference to the legal title where there is question concerning legal right[2]. True, also, the purchaser is equally within the theoretical equity which it seems probable that the court desired to effectuate by tacking. But to enable the greater stretch of principle to be made in applying it to absolute estates, some principle of equity seems needed which should be even stronger than that of consolidation, the equity which seems to have furnished the means in the case of incumbrances.

To turn back to the precedents. Let us look at this case of Bailey *v.* Barnes, which will exemplify the position while its exact concern with the doctrine of tacking can at the same time be determined. By reason of the strength of the Court of Appeal[3] it is entitled to great weight, and the proposition that tacking applies as between absolute estates is there indeed expressly laid down.

[1] 1894, 1 Ch. 25—C. A. Lord Westbury's dictum in Phillips *v.* Phillips also refers to "purchasers or" incumbrancers as competing for the *tabula*—see Ch. II.

[2] Thus in Marsh *v.* Lee itself the pleadings sometimes refer to the defendant's puisne mortgage as his "purchase."

[3] Lindley, Lopes and A. L. Smith, L.JJ.

In that case one Johnson, owner of an estate, mortgaged it. The plaintiffs were interested in the equity of redemption by reason of having taken it in equitable execution under a judgment by appointing a receiver, and they thus had a right to redeem. The mortgagee or his transferee had by a questionable transaction purported to exercise his power of sale as mortgagee in favour of the predecessor in title of the virtual defendant, one Lilley. The plaintiffs had therefore also an equity to rescission as against that predecessor. Lilley's predecessor having thus purported to buy the estate, next, as the absolute owner, mortgages the estate in his turn, for £6000: then he sells to Lilley the equity of redemption; that is, of course, he sold the estate subject to this £6000 mortgage. Lilley was a *bona fide* purchaser and had no notice that anything was wrong with the exercise of the power of sale under the previous mortgage. Subsequently hearing of this, however, he sought to strengthen his title by obtaining the legal estate, that is, he exercised the right of redemption which he had bought, and paid off the £6000 mortgage, duly obtaining the reconveyance. Stirling, J., in the court below held that he was entitled to the protection which the Conveyancing Act, 1881, sec. 21 (2), confers upon the purchaser from a mortgagee selling under his power, Lilley being an assignee for valuable consideration without notice from such a purchaser. He had purchased the right to redeem, and this being protected, the fact that he had notice upon his subsequent acquisition of the legal estate, obtained in the exercise of that right, was immaterial. His statutory protection covered the legal estate when so obtained.

In the Court of Appeal this reasoning was approved, but a further ground was taken. Lindley, L.J., delivering the judgment of that court, said: "The case, then, stands thus: the plaintiffs had a judgment affecting Johnson's equity of redemption. Lilley had acquired by purchase for value an equitable interest in the same property from a person whose title apparently displaced Johnson's, and also, consequently, the plaintiffs' judgment. Lilley had no notice of any defect in his own title, no notice that the plaintiffs' judgment affected him. Lilley afterwards discovers that the plaintiffs' judgment

is not displaced, and in order to protect himself he pays off the £6000 mortgage and gets in the legal estate. The question is whether he can now hold the property free from the plaintiffs' judgment.

"We are of opinion that he can. The maxim *qui prior est tempore potior est jure* is in the plaintiffs' favour, and it seems strange that they should, without any default of their own, lose a security which they once possessed. But the above maxim is, in our law, subject to an important qualification, that, where equities are equal, the legal title prevails. Equality, here, does not mean or refer to priority in point of time, as is shewn by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only. The reasoning is technical and not satisfactory; but, as long ago as 1728, the law was judicially declared to be well settled and only alterable by Act of Parliament: see Brace *v.* Duchess of Marlborough[1]. It was contended that this doctrine was confined to tacking mortgages. But this is not so. The doctrine applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them[2]."

This looks at first sight as though the law applied by the Court of Appeal in Bailey *v.* Barnes was as much the doctrine of tacking as the Conveyancing Act. The legal position is somewhat involved, but, it is submitted that upon analysis it does not admit of statement in terms of tacking. Neither is it an application of the doctrine of Spencer *v.* Pearson[3], itself probably an extension, to the stronger case of

[1] 2 P. Williams, 491. (This does not seem quite correct. Perhaps the case intended to have been cited was Jennings *v.* Jordan.)

[2] The court cited no authority for the proposition, nor does the report shew that the point was taken in argument on either side.

[3] *Ante*, Ch. III. 55–6.

the absolute purchase of an equity of redemption. If the facts in Bailey *v.* Barnes are to be considered as presenting a case of tacking that decision would establish a result far more drastic and destructive than has been established by the old tacking authorities reviewed above, and which have in modern times been so universally condemned. For there the mesne is but postponed: if he would make a claim to relief in respect of the legal title he must redeem the puisne debt, that is all. But here he cannot do so—it is irredeemable, and he is therefore utterly destroyed. Let us see how this would work out in the present case. The plaintiffs' equity consisted as much in their interest in Johnson's equity of redemption as in their mere claim to rescission. That being so, the fact that Lilley's legal title was held to triumph seems, if the case is placed on a tacking basis, to involve the conclusion that this right of redemption in the plaintiffs was destroyed by tacking the prior legal estate against them. That is to say the decision would establish this proposition, that a *bona fide* purchaser who buys from a mortgagor his equity of redemption may, if that purchaser then be without notice of an incumbrance on the equity of redemption purchased, nevertheless redeem the mortgage and by obtaining a conveyance of the legal estate destroy the right of redemption of the mesne incumbrancer. The conveyance of an equity is said to be an innocent conveyance, but here it will have operated tortiously. There surely is no need or justification for such an extension of the doctrine of tacking. In the case of incumbrances the doctrine merely involves the result that an intermediate incumbrancer has an extra burden cast upon him as a condition of redeeming the first mortgage, namely he must pay off the subsequent incumbrancer as well as the former. But in such a case as this, or as Bailey *v.* Barnes if the facts there admit of being so stated, the subsequent equitable interest is not redeemable at all but is an absolute and irredeemable estate. It would follow, upon strict tacking principles that neither can the legal mortgage be redeemed at all. This seems a very serious consequence, and one perhaps not generally realised, and if it is the law it constitutes a great increase to the known risks

run by equitable mortgagees. But unless the doctrine of tacking is very clearly established by precedent[1] as applicable where the puisne estate is not redeemable it should certainly not be so applied.

Their Lordships in Bailey *v.* Barnes expressly did not deal with the case as on the footing of tacking incumbrances. Their remarks however and the reference to Brace *v.* Duchess of Marlborough necessarily involve a reference to tacking in some form. But it does not in fact seem possible to state the position in terms of tacking. It would be necessary to say that there was: first, a puisne equitable interest, namely Lilley's equity of redemption, acquired for valuable consideration without notice of a mesne interest; secondly, prior to it, as the mesne interest, the equity of the plaintiffs; and thirdly, a legal estate brought in by Lilley as the puisne owner after notice of the mesne interest. There were however two mortgages and two equities of redemption: Lilley's equity of redemption and the legal estate he acquired under it both belonged to a title paramount to that to which Johnson's equity of redemption belonged. The contest was really between these two titles, and no mesne interest was in question. Lilley's real position seems actually to have been no more than the ordinary one of a *bona fide* purchaser of a legal estate who is without notice of a prior equity. This legal estate he was entitled to hold not only by reason of the protection given him by the statute, but because he obtained it under his right of redemption which he purchased when still without notice. In the same way, a contract, entered into at the time of acquiring the equitable estate which gives the right to the legal mortgage will have the same effect; and when that legal estate is obtained it relates back (so far at any rate as notice is concerned) to the date when the right to acquire it was given. Lilley's title was one paramount to Johnson's equity of redemption and even his equitable interest arose under that paramount title, for it was derived out of a legal estate vested in one claiming under the earlier and legal mortgage given by Johnson. In exercise of his right

[1] See the citations in the previous chapter on this point.

of redemption, Lilley acquired that legal estate, and thus in two steps first by purchasing the equity of redemption, next by exercising it, he stepped into the shoes of Johnson's mortgagee and obtained the whole title paramount to the plaintiffs' interest accordingly. As the whole of that title was prior so was his equity prior to that of the plaintiffs unless and until upset by the setting aside of the title altogether. Theirs also was accordingly a prior claim—an equity to the rescission of the document whereby the power of sale had destroyed their equity of redemption: it was not a mesne equity to be crushed between the upper and nether millstones of Lilley's legal and equitable estates, as the position would have to be stated in terms of tacking. In this view Lilley triumphed because his title was first in time; and the plaintiffs' equity, their claim to rescission, with the interests behind it, fell a victim merely to the tortious operation of the legal estate[1], and Lilley triumphed merely as a *bona fide* purchaser without notice, having the legal estate, not as a transferee of the prior legal mortgage given by Johnson. He was not saved, that is, as the puisne incumbrancer in Spencer *v.* Pearson was saved, by obtaining and tacking a *tabula*. That he purchased from one affected with notice of the defective title—one who was actually a party in the doubtful transaction—made of course no difference[2].

This decision of the Court of Appeal is therefore no direct authority upon tacking, far less an authority for depriving a mesne owner or incumbrancer of his right to redeem. It is but an authority for the proposition (which might be of use in

[1] As did an equity to rectification in Garrard *v.* Frankel, 30 Beav. 445 (1862)—Romilly, M.R.

[2] Harrison *v.* Forth, Prec. Ch. 51 (1695). What seems to be a curious mistake in this connection is often repeated in the books. It is said that the equity of a charity constitutes an exception to the rule that a purchaser without notice can purchase free of an equity of which his vendor had notice, and *vice versa*. The authority relied upon as establishing such an exception is an old case, occurring in 1633 before Lord Coventry, and reported in Duke's *Charitable Uses*, 64 (1676), in connection with land charged with a rentcharge to support some almshouses at East Grinstead. It is however no authority for such a proposition as the fact seems to have been overlooked that the interest in question there was a legal use and not an equity at all.

a tacking case) that notice after the purchase of an equity of redemption does not affect the right of the purchaser to obtain by redeeming the status of a *bona fide* purchaser of the legal estate without notice.

The court however, and a very strong court, at any rate expressed the opinion that the doctrine of tacking is not confined to mortgages. And some other, though very slender, authority has been cited above for that proposition. But are the precedents to be considered strong enough in these days to support the iniquity? They are not an overwhelming body, and it may be questioned whether in any case, tacking being now generally reprobated, the courts must necessarily at this day follow early and (being very baldly reported) by no means decisive cases in this matter. Clearly in the case of tacking two incumbrances the mesne incumbrancer is postponed; that is established beyond remedy save by the legislature[1]. But in the case of tacking a puisne absolute estate against the mesne, matters have perhaps not yet gone so far that he must be a victim in this case too: and must suffer not merely postponement but utter annihilation, for there can be no mere postponement here. Accordingly, the, as it seemed to Lindley, L.J.[2], when speaking of tacking as between incumbrances, "unanswerable objections to the rule," apply with even greater force where the puisne estate is absolute. The right of redemption, moreover, is in modern times jealously guarded[3], and modern courts in this direction have perhaps gone further than the older courts of equity may have been moved to do. Notions of justice vary with the times, and the destruction of an equity of redemption perhaps would not now be allowed to take place in every case where the courts in times long past may perhaps have been inclined to allow it. And it is submitted that the court is not bound to apply the

[1] *Per* Lord Blackburn in Jennings *v.* Jordan, *sup.* p. 59.

[2] In West London Commercial Bank *v.* Reliance Permanent Building Society, *ib.*

[3] In particular, consider the stringent modern view in regard to a "clog on the equity of redemption"; British South Africa Company *v.* De Beers Consolidated Mines, 1910, 2 Ch. 502—C. A.: and in regard to consolidation.

precedents relating to tacking incumbrances, merely as precedents, to the case where the puisne interest is not a security redeemable by the mesne; while, as to principle, it is quite likely that those precedents did not intend to go beyond that involved in the idea of consolidation. As to the root-principle upon the technical side, that the legal estate is placed beyond the jurisdiction of equity by the plea of *bona fide* purchaser—such means can scarcely of itself now lead to that result, a result which arose originally only "because the jurisdiction of law and equity is administered here in different courts[1]." The consequences which have resulted from that technical position now only remain law by reason of the binding force of precedents applicable to a set of facts *in consimili casu*: the principle itself is dead, and incapable of further mischief.

As to the case of the prior legal estate being irredeemable, on the suggested basis of the doctrine of tacking above advanced, that case as has been seen apparently could never have existed at all. Some other explanation must (in the absence of precedent) be forthcoming for the doctrine of tacking before that doctrine can be applied to such a case upon principle alone.

That at any rate a doubt may exist concerning the applicability of the doctrine of tacking otherwise than as between incumbrances thus perhaps appears. And needs emphasising. With lawyers as with others, art for art's sake is a potent factor in the development of technicalities. The doctrine of tacking has received judicial reprobation many times confirmed; to every lay mind it must seem irrational and unintelligible. But notwithstanding, in some of the cases where the doctrine has been applied—it would be invidious to specify any modern instance—is it not possible perhaps to detect a note rather of triumph than of surrender—the triumph of art, not the surrender of justice to the binding force of unfortunate precedent? The observation which has been made[2], in reference

[1] Lord Hardwicke in Wortley *v.* Birkhead, *sup.* p. 30.
[2] Holdsworth, *H. E. L.* II. 502.

to the development of the common law in the age succeeding Bracton, that "a purely professional development is not good for the health of any legal system," would surely receive a strong illustration were our courts to apply the doctrine of tacking in the most disastrous case of all, if it be not clearly necessary to do so[1].

[1] And might not another parallel even suggest itself:—

"I weep for you," the Walrus said:
"I deeply sympathise."
With sobs and tears he sorted out
Those of the largest size...?

CHAPTER V

TRUSTS AND THE *TABULA*

It is to be found laid down in an old authority: "*Per Cur.* Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust[1]." This exception was, as will be remembered, touched upon by Lindley, L.J., in Bailey *v.* Barnes in the passage already quoted. It seems based on one of the fundamental principles of equity.

An important distinction however must be taken. Where the conveyance is made at the time of payment, or perhaps in the course of the same transaction, it matters nothing that the vendor or mortgagor is a trustee conveying in breach of his trust so long as there is no notice[2]. The equity of a *bona fide* purchaser without notice to retain his legal estate is stronger even than the equity of one entitled under an express trust. To put the matter in a way theoretically more correct: in these circumstances even an express trust is not an equity strong

[1] Saunders *v.* Dehew, 2 Vern. 271 (1692).

[2] Peacock *v.* Burt, 4 L. J. N. S. 33 (1834)—*per* Pepys, M.R.: "The knowledge of a vendor has never been held to bind a purchaser for valuable consideration without notice; and against this application of the rule there is no exception"; and Pilcher *v.* Rawlins, 7 Ch. App. 259. It may be noticed that one consequence is, "the best right to call for the legal estate" may itself be defeated in this way, for that is only a trust.

enough to take away the legal estate so acquired. On the other hand, the acquisition of the legal estate merely as a *tabula* is usually not a transaction for value, and here at any rate the fact that it is conveyed in breach of an express trust will prevail to take it away[1]. That no consideration need be paid for the legal estate or prior incumbrance to enable it to be used as a *tabula* has been clear from the first[2]: it has even been suggested in the older authorities that use could be made of a legal estate obtained by fraud[3]. The acquisition of the *tabula* is in principle but a remedial step permitted by equity to be taken so long as it can be taken without encountering a superior adverse equity.

A very recent and an interesting illustration of the importance of these distinctions occurs in the case of Perham *v.* Kempster[4]. The defendant was one of the trustees of a will under which a freehold house was devised to them upon trust for the defendant beneficially, certain debts and legacies being charged by the testator upon his real estate. Six months after the death of the testator the defendant charged his interest under the will to the predecessor in title of the plaintiff. A few years after that the defendant became sole trustee by survivorship, and eventually, concealing this equitable incumbrance, he gave a charge by deposit of the title deeds to a bank, the memorandum including an undertaking to execute a legal mortgage. This he executed shortly afterwards. Now, as it happened, there was then a legacy remaining unpaid: and the trusts of the will were for this and other reasons still on foot. As Joyce, J., put it, there was no merger of the equitable interest of the mortgagor in his legal estate because of (1) the legacy, (2) the assignment to the plaintiff's predecessors by way of mortgage, and (3) the equitable mortgage to the bank. Had the bank merely thus subsequently to the advance obtained the

[1] Mumford *v.* Stohwasser, 18 Eq. 556, 563—Jessel, M.R. And in other cases the efficacy of value itself even if given can of course be destroyed by notice; Bovey *v.* Smith, 1 Vern. 144, 149 (1682).

[2] Holt *v.* Mill, 2 Vern. 279 (1692).

[3] Huntington *v.* Greenville, 1 Vern. 49, 52 (1682)—Lord Nottingham, L.C.

[4] 1907, 1 Ch. 373—Joyce, J.

legal estate as a *tabula* from a trustee, though (on the facts) without notice of the previous charge, the bank would in any case have been equally with the defendant a trustee, and a trustee for the prior incumbrancer, assignee of the beneficial interest under the will. The bank could not in that case have used the legal estate against him, notice or no notice, whether the notice amounted to actual knowledge of the trusts or of the mere fact that the defendant was or had been a trustee[1], for by notice the whole trust is passed on with the property. But when obtaining the legal estate the bank made a further advance, and thus became a purchaser, so that it was accordingly necessary to shew notice of the trusteeship. On the facts this was (but not without some strenuous argument to the contrary) duly established, and was held to be enough to dispose of the bank, notwithstanding the fact that there was no notice of the prior charge.

There appears to be one small case exceptional to the distinction just drawn—it seems hardly possible to state it otherwise than as an exception. A transferee of stock who receives notice of the fact that the transfer was made in breach of trust by the transferor, after he has paid his money but before he has registered his transfer, may still get in the legal estate by completing his registration[2]. The ground of this decision seems to have been that the registration involved no further act by the trustee, and nothing but the act of the transferee was necessary; the position was also likened to an estate to become legally vested on the performance of a condition[3]. This solitary decision has been several times distinguished, and

[1] *Per* Joyce, J., at p. 380.

[2] Dodds *v.* Hills, 2 H. and M. 424 (1865)—Page Wood, V.C.

[3] As to the condition theory, query could a condition be performed after notice so as to get in a legal estate against a prior equity? After the analogy of an equity of redemption or a covenant to execute a legal mortgage, probably it could if the party were a purchaser, or in the position of a purchaser, if the notice were of an ordinary equity. But if it be of an express trust it would seem on the principles stated above that the case must be otherwise. And in the case of copyholds, what if notice of a trust intervenes between surrender and admittance? For certain purposes at law the admittance relates back to the date of the surrender; but will it do so in equity, on the principle of Dodds *v.* Hills, to destroy an express trust?

to the verge of being distinguished away altogether. The process has indeed gone so far as holding that the case does not apply where a company, bound by its constitution not to recognise the rights legal or equitable of anyone but the registered holder, receives notice, pending the registration, of the rights of the *cestui que trust*[1]. Beyond Dodds *v.* Hills itself, which has perhaps attained an illusory prominence from the mere process oft repeated of being distinguished, there seems little or no authority for its doctrine.

One would suppose from the principle above enunciated, namely that a legal estate cannot even when the transferee is without notice be transferred in breach of trust as a *tabula* merely, and can only be transferred free of the trust to a purchaser without notice for valuable consideration paid at the same time, that there would follow this further principle: that the trustee himself cannot use as a *tabula* the legal estate which he has in trust. If he cannot enable another to do so, surely he cannot so use it himself. Nevertheless judicial authority seems to be drifting towards a curious distinction here. Where the trust is in favour not of the mesne but of a third party then the tendency is towards disregarding the existence of a trust. In other words there is some authority that a legal estate held *en autre droit* can in some circumstances be available as a *tabula*, though there is considerable weight of older authority against it as a general proposition.

The cases which at first sight seem to support this tendency are those in which a trustee has made advances to his *cestui que trust* on the security of the interest of that *cestui que trust* in the property, the trustee making the advances being of course without notice of any intervening equity. In these cases he has been held entitled to priority; and because, it has been said, the trustee has rested on his legal estate. It is submitted that the decisions are really only to be supported upon other grounds. Take for example the case of Wilmot *v.* Pike[2], where the third mortgagee was held entitled to priority over the second by virtue of having the legal estate in trust

[1] Roots *v.* Williamson, 38 Ch. D. 485—Stirling, J.

[2] 5 Hare, 14, 22 (1845).

for sale to secure the first two mortgages and, subject to them, for the mortgagor beneficially. "I think," said Wigram, V.C., there, "the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. His case, however, might, perhaps, be supported on the simple ground, that he had the legal estate, and advanced his money without notice, leaving every trust of which he had had notice untouched by his present claim." Now, as regards the first ground, it might be said at once that in many directions a trustee is in fact precluded by his situation from claiming a benefit—he cannot as a general rule purchase the trust property or obtain remuneration out of it for professional services, for example. The reasoning was, however, more subtle than this. It has been seen above that a "right to call for the legal estate" may arise when the person in whom the legal title is vested has merely been joined as a party to the document under which the equitable interest arises[1]. The reasoning of Wigram, V.C., is that the lender, being himself the trustee, could not have this means of strengthening his title unless he were also able to be joined as such. But it seems fallacious in two respects. (1) He has as trustee no right to give another, least of all himself in his personal capacity and those claiming through him in that capacity (heirs, executors or assigns), the right to call for the legal estate for a purpose outside the trust; and (2) the principle above stated in reference to the subsequent acquisition of the legal estate with notice of a trust would affect him so soon as he came to need it, namely when he came to hear of the intermediate incumbrance, for notice of that incumbrance makes him a trustee for the incumbrancer. If this is not so, then one with a right to call is in a better position than one who actually has the legal estate—a *reductio ad absurdum* indeed.

As to the second, "the simple ground" advanced by the Vice-Chancellor, he decided the case (after admitting that his opinion had undergone some fluctuation) in favour of the trustee upon reasoning based upon two supposed cases. One

[1] See *per* Stirling, L.J., in Taylor *v.* London and County Bank, *ante*, Ch. I. p. 8.

was that the trustee had sold under his power of sale, when, in the absence of notice of the mesne incumbrance, he would clearly be entitled to pay over the surplus to the mortgagor after discharging what was due upon his two charges. The other was that, without selling, he had declared himself a trustee for a new incumbrancer, subject to the existing ones, before receiving notice of the completion of an intermediate dealing by the mortgagor. That the trustee would be equally justified here is equally independent of any question of the legal estate (which in the first of the two cases he would have conveyed to the purchaser), and for the same reason—the mere fact that he had received no such notice.

Newman *v.* Newman[1] is another case of the same character, and in the Law Reports the head note (perhaps misled by a preliminary remark in the judgment) definitely mentions the legal estate as of determining importance. North, J., held that a trustee was entitled to priority for his advance over a prior dealing by the *cestui que trust* with a third party, of which dealing the trustee had received no notice. But here also the ground was merely that in the absence of notice of the intermediate dealing the trustee has the same equities against the assignee as he would have had against the assignor, and the decision expressly went upon the authority of two cases[2] in support of that proposition. Neither of these cases puts forward the legal estate as the ground of decision; and one of them, as North, J., himself remarked, did not refer to the legal estate at all. Yet the head note summarises the decision as follows: "A trustee who has the legal estate and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice."

Then comes a very different and a curious case, that of Taylor *v.* Russell[3], which went to the House of Lords. There

[1] 28 Ch. D. 674.

[2] Phipps *v.* Lovegrove, 16 Eq. 80—James, L.J.; and Browne *v.* Savage, 4 Drew, 635 (1859)—Kindersley, V.C.

[3] 1891, 1 Ch. 8; 1892, A. C. 244.

the plaintiffs held the mesne incumbrance, and the defendants the puisne, obtained from the same mortgagor without notice. The *tabula* had to be obtained from a previous mortgagee to whom it had been accidently conveyed with the other property intended to be mortgaged. The mortgagee passed this legal estate to the defendants by reconveying it to his mortgagors upon the express condition that they should pass it on to the defendants. These mortgagors, the Surtees trustees, had sold and had purported to convey the property in question to the mortgagor from whom subsequently the plaintiffs and defendants took their securities. The previous mortgagee was also a trustee—under the Legard trust. The point was taken in argument on behalf of the plaintiffs that the Surtees trustees in these circumstances were trustees for the plaintiffs, as the earlier assignees of their purchaser, by the operation of the covenants for title in his mortgage, besides being trustees for third parties, and therefore the plaintiffs had an equity to deprive the defendants of the advantage of the legal estate. Kay, J., in the court of first instance had held that the Surtees trustees having once obtained a reconveyance, there was a duty incumbent upon them to convey it to the plaintiffs who as the earlier assignees from their purchaser had the best right to call for it. "In that sense," the learned judge said, "they were trustees for such assign. Any conveyance by them to another person would be a breach of such trust." In the Court of Appeal this however was over-ruled, and Fry, L.J., delivering the judgment of the court (Sir J. Hannen, and Bowen and Fry, L.JJ.), dealt with the matter on the basis that the express condition or trust to pass on the legal estate would over-ride any other equity or trust, including any equity arising from the possible breach of the Surtees will trusts by reason of the acts of the trustees being in excess of their powers. No equity could require them to be guilty of so gross a violation of confidence as would have been involved by a breach of the express condition to convey to the defendants. "But," the judgment continues, "assuming that these acts" (of the Surtees trustees in passing on the legal estate) "were such as those who claim under the will of Mr Surtees could complain of, it

appears to us that they afford no assistance to the plaintiffs. A man may come to equity and successfully say to a defendant, 'you have obtained the legal estate in breach of an equity which I possess or of a trust under which I claim, and you shall not set it up accordingly'; but a plaintiff cannot rely on some breach of trust towards third persons who assert no title to the estate and take no part in the litigation. The plaintiff, to deprive the defendant of the benefit of the legal estate, must rely on an equity of his own, not on that of a stranger." And (after referring to two cases, which seem merely to support the not necessarily converse proposition that a trust in favour of an incumbrancer who is a party to the litigation could be set up) Fry, L.J., concluded: "On authority, therefore, as well as principle, we are of opinion that a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up."

In the House of Lords, however, the appellants' (the plaintiffs') case was disposed of on the grounds first stated in the judgment of the Court of Appeal. Lord Herschell was of opinion "that the matter must be dealt with upon the same footing as if the conveyance had been made directly from the Legard trustees to the defendants." Lord Macnaghten added: "But then it is said that the legal estate passed through the hands of the Surtees trustees, and that they were trustees for the appellants in a sense. I am not quite sure that I know what that expression exactly means. But of this I am sure, that it is only when the legal estate has been acquired from a trustee in the proper sense of the term that the acquisition of it has been held of no avail. And certainly the Surtees trustees were never trustees of this property for the appellants." And as to the Legard trustees he said: "So long as it is the settled rule of the court that a subsequent incumbrancer may gain priority by getting in the legal estate, and that there is nothing in itself inequitable in so disarranging equities, I do not see how it can be contended that there was anything contrary to equity, or anything involving a breach of trust or a breach of

duty in the transfer of the legal estate from the Legard trustees to Russell...on these simple grounds, without discussing the doctrine of the *tabula in naufragio*, or attempting to define the limits of its application, which it appears to me would be no easy matter having regard to the current of modern authority, I think the appeal must be dismissed."

The remarks of the Court of Appeal upon the proposition that a legal estate *en autre droit* may be set up were therefore *obiter*, and indeed, even had the case not stopped where it did, the question would probably never have actually arisen, for there was yet another equity in front of the trusts in favour of the third persons—that arising by virtue of the covenants for title. It is contended that there is no authority (other than the weight which the opinion of such a court must necessarily carry) in favour of the proposition. The cases cited by Fry, L.J., seem to lend no support to it.

There is an old authority[1] which probably should be read as one against the supposition that a legal estate *en autre droit* can be set up. In this it was held by the then Master of the Rolls that the executor of a mortgagee could not set up against the creditors of a deceased mortgagor who had given a general charge by will in favour of his creditors, the legal estate vested in the executor as such, in respect of a further advance by the executor personally. The personal advance was made after the death of the mortgagor to his successor in title to the property in mortgage, and presumably without notice of the existence of the creditors, or a question could scarcely have arisen at all. In terms of tacking therefore, the case is perhaps a decision that the executor could not tack his puisne equity against the mesne charge of the creditors. The report is not altogether clear as to the element of notice, however, which detracts somewhat from this case as an authority against tacking a legal estate held *en autre droit*. But it is at any rate worth mentioning here because it has occasionally been taken as supporting the contrary proposition—owing to the use, in another part of the case, of the word "tacking" in the sense of

[1] Price *v.* Fastnedge, Amb. 685 (1770)—Sewell, M.R.

enforcing the two mortgage debts together. This of course was to prevent circuity of action only, and is not tacking in the sense of the doctrine now under consideration.

By way of further authority against the proposition that a legal estate held *en autre droit* is available as a *tabula*, there may be cited a weighty dictum of Lord Hardwicke directly in point, occurring in the classic case of Morret *v.* Paske[1]. He was explaining there that a judgment creditor who was in under an *elegit* had an estate to which a mortgage could be tacked. He added, "but this rule holds only where the same person has both judgment and mortgage in the same right." It is true that he continued, "and not where he has the judgment in his own right, and the mortgage in another right, as a trustee only," which is only one side of the matter; but apparently Lord Hardwicke made this remark by way of applying the general proposition to the case before him. He argued that, "if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers; if this was permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together and defeat all the other incumbrancers." Only the person beneficially entitled could be allowed to set up the claim—this is the reasoning, and it seems also to apply in the converse case.

Sir William Grant, M.R., too, in a more modern case, took a view of the law entirely inconsistent with the view of the Court of Appeal in Taylor *v.* Russell as expressed by Fry, L.J. In Barnett *v.* Weston[2], the case referred to, the first, the legal, mortgagee became the executor of the third, who had taken his mortgage without notice of a second intervening mortgage. It was held that he could not, as third mortgagee, tack against the second mortgagee the legal estate of his own mortgage with the puisne mortgage which he held as executor. Grant, M.R., first laid down the law thus: "The law of this court gives a person, who has obtained a mortgage of the equity of

[1] 2 Atk. 52, 53 (1740).
[2] 12 Ves. 130 (1806).

redemption, this chance; that he may get in the legal estate, if he can; and, if he does get it in, the legal estate being united to his equity of redemption, he would have priority over all the mesne mortgages." He then proceeded to point out that there had been no such uniting of the legal estate in this case, for the first mortgagee did not get it as executor of the third, but had it himself in his own right before the third mortgagee had any existence. "It is just the same as if the estates were in two different persons; being in the same person in different capacities: the legal estate in his own right: the equitable interest in right of his brother. The legal and equitable estates cannot unite to the effect of squeezing out (as it has been expressed) mesne mortgagees."

The proposition that equity will not interfere to deprive a party of the personal benefit of a legal estate which is vested in him in another capacity would be intelligible only on the view that legal right has a sanctity in the eyes of equity stronger even than has obtained in the past. But there can be no occasion, the jurisdictions being now actually separate no longer, for modern courts of general jurisdiction to extend doctrine concerning the legal estate beyond the older authorities. Surely, too, it is a wholesome rule, and one that might well be deemed of sufficiently general application as a rule of conduct to raise the necessary equity to interfere with the legal estate, that a trustee must not use the trust property for his private ends. That the use of the legal estate does no harm to the *cestui que trust*—it is but being used for the purpose of committing an injustice against a third party—is no answer. Probably many a person, in the case of goods or money at any rate, has used such reasoning with himself, but nevertheless the criminal law has reached him, on different grounds technically, no doubt, but the moral of the matter is the same. Of all persons a trustee should not, and in a court of equity of all places, be heard to allege his personal use of property belonging to another[1], and this whether that other is a party to the proceedings or not—it is enough that the court is aware of the

[1] See *per* Bowen, L.J., in Soar *v.* Ashwell, 1893, 2 Q. B. 390, 397.

circumstance, as it usually must be. *Nemo allegans turpitudinem suam est audiendus.*

To pass on now to a different matter, Lord Macnaghten, in a passage already quoted in another connection[1], stated his opinion very definitely that it is only when the legal estate has been obtained from a trustee in the proper sense of the term that the acquisition of the legal estate has been held to be of no avail. The reason must be technical only, and it seems to lie in the special sanctity of the interest of the *cestui que trust* under an express trust. This interest the Court of Chancery has throughout struggled to endow with a true proprietary character and to prevent from sinking to the level of a mere unsecured debt. So even that favourite of equity, the *bona fide* purchaser, has to take a second place as to his *tabula*; and a *cestui que trust* will be protected against tacking even if entitled only under a voluntary trust, and a trust which will perhaps not stand (under modern legislation) against simple contract creditors. In this light, the exception from the doctrine of the *tabula* seems to modern eyes even less rational than the rule.

And exactly who, for the purpose of the above exception, is to be deemed a trustee, gives rise to much difficulty. It cannot be said, in spite of equity's supposed abhorrence of the injustice of tacking, that any points have been stretched here against that doctrine and in favour of the exception. Under the Statutes of Limitation the definition of an express trust has received considerable extension, for which it would be difficult to account on principle[2]. The inherent difficulties of defining a trustee in the case of tacking are at least as great, and one would expect to find here also some anomalous extension in the interests of a *cestui que trust* accordingly.

This seems however to be the tendency in perhaps only one direction. There is some recent authority that a satisfied

[1] Taylor *v.* Russell, *ante*.

[2] See *per* Bowen, L.J., in Soar *v.* Ashwell, 1893, 2 Q. B. 390, 396. It would seem from some of the cases cited above, however, that his "constructive trust" arising by reason of notice of an express trust, is an express trust for tacking purposes, if not for those of the Statutes of Limitation. And see p. 86 n. 1 *post*.

mortgagee, or where none of the incumbrancers has a legal mortgage the mortgagor, is to be deemed an express trustee. But it is difficult to say for whom. Perhaps for all the incumbrancers; so that he cannot pass on his legal estate as a *tabula* and thus prefer one of them. Or perhaps he is a trustee for the person who has the best right to pay off, having regard to the analogy presented by the effect, as now settled, of a building society's statutory receipt. The receipt is, under sec. 42 of the Building Societies Act, 1874, to "vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption." After a considerable amount of controversy it is now established[1] that these words mean the person who has the best right to redeem. There is this much support for the supposition that a satisfied mortgagee is a trustee, that in Bates *v.* Johnson[2] Page Wood, V.C., obviously regarded him as such and said he could find no authority that the legal estate can be got in from a mortgagee whose mortgage is satisfied. Again, the same judge in Carter *v.* Carter[3] said: "The mortgage having been satisfied, the mortgagee was, of course, a trustee for the true owner of the estate." And Lord Eldon would have gone so far perhaps as to deem a first mortgagee a trustee wherever he knew of the second, whether the first mortgage was satisfied or not; and this is probably the meaning of a well-known question put by him[4].

There is some support for the supposition, in the case of the mortgagor where none of the incumbrances are legal, that he is a trustee of the legal estate for all his incumbrancers. In Sharples *v.* Adams[5], Romilly, M.R., expressed himself strongly

[1] Hosking *v.* Smith, 13 A. C. 582; Crosbie-Hill *v.* Sayer, 1908, 1 Ch. 866—Parker, J.

[2] Johns. 304, 316 (1859).

[3] 3 K. and J. 617, 638 (1857).

[4] Mackreth *v.* Symmons, 15 Ves. 329, 335 (1808). "Is there any case, where a third mortgagee has excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second? When the case of Maundrell *v.* Maundrell was before me, I looked for, but could not find, such a case; that, where there was bad faith on the part of the first mortgagee, that equity was applied."

[5] 32 Beav. 213 (1863).

in favour of that view. But the point was not necessary to the decision, and his dictum has not been accepted without comment[1]. The case he put was that of a mortgagor granting three successive equitable mortgages to three persons. But it could equally well be maintained that the mortgagor would not be permitted to give priority, by means of a transfer of the legal estate, to one of the two later incumbrancers who had made his advance without notice, upon the principle that a man may not derogate from his grant.

In the case of the satisfied mortgagee it is quite clear that to hold him to be disqualified from giving a *tabula* would be a judicial modification of earlier doctrine. A large proportion of the earlier precedents on tacking are expressly cases of tacking satisfied incumbrances, namely extended judgments and the like, as has been seen above. And on the direct point, Lord Keeper North expressed himself with no uncertain voice in 1683[2]. The report says: "The third mortgagee hearing of the two former securities buys in the first incumbrance, to wit, a judgment that was satisfied: and it was strongly insisted at the bar, that though this trade of buying in incumbrances had been formerly countenanced here, yet it was in truth a thing against conscience, and contradictory to many established rules of law and equity. But after long debate the Lord Keeper told them he wondered the Counsel laid their shoulders to a point, that had been so long since settled, and received as the constant course of chancery...being once solemnly settled, as it

[1] For further discussion of cases see *Wh. and T. L. C.* 7th Ed. II. 118, *et seq.* And add Sands *v.* Thompson, 22 Ch. D. 614, 617, where Fry, J., held a satisfied mortgagee not to be an express trustee within the meaning of sec. 25 of the Real Property Limitation Act, 1833. "My notion of an express trust," said the judge, "is that it is a trust which has been expressed, either in writing or by word of mouth, and that it does not include a trust which arises from the acts of the parties. The term does not apply, in my judgment, to a resulting trust, to an implied trust, or to a constructive trust." (It had been contended in argument that every trust which does not require the assistance of the court to raise it, is an express trust.) Presumably it is to an express trustee that Lord Macnaghten refers as "a trustee in the proper sense of the term." As to another field for the question, see Stroud *v.* Gwyer, 28 Beav. 130 (trust moneys wrongfully employed in the trustee's business).

[2] Edmunds *v.* Povey, 1 Vern. 187.

was in the case of Marsh and Lee, he would not now suffer that point to be stirred[1]."

As regards the mortgagor who has retained the legal estate there seems to be little authority. Taylor *v.* Russell, it is perhaps worth while to point out, is at any rate none, by reason of the over-riding trust there to pass on the legal estate when reconveyed. It is, rather, an authority on the other side, since the Legard trustees were something very like satisfied mortgagees as to the property reconveyed.

Perhaps the courts are both more at liberty and more inclined to treat the mortgagor having the legal estate, than the satisfied mortgagee, as a trustee for all incumbrancers according to their priorities in time. Witness the attempt that has been made to establish a distinction as regards the presumption against merger between payment off by a puisne incumbrancer and by a mortgagor[2]. But this is now exploded[3], and does not take the matter very far.

[1] Other early instances are Bovey *v.* Skipwith, 1 Ch. Ca. 201 (1671); Stanton *v.* Sadler, 2 Vern. 30 (1687)—a satisfied extended statute; Turner *v.* Richmond, *ib.* 81 (1688); Holt (the Chief Justice) *v.* Mill, *ib.* 279 (1692)—"an old satisfied incumbrance."

[2] Adams *v.* Angell, 5 Ch. D. 634; Toulmin *v.* Steere, 3 Mer. 210 (1817).

[3] Thorne *v.* Cann, 1895, A. C. 11, and Fisher, *Mortgages*, 6th Ed. (1911), 781.

CHAPTER VI

POSSESSION *IN PERSONAM*

THE complications hitherto considered arise chiefly because equity has no jurisdiction to interfere with legal title in the absence of some claim, coming under some established head, upon the conscience of the legal owner. The anomalous position to be considered in this chapter arises by reason of the rule that equity acts *in personam.* This rule is usually stated as the basis of equitable jurisdiction. It is nevertheless as much a disabling as an enabling principle, and it indicates as much the limit within which courts of equity have made good their claim to interfere with legal right as the means by which they did so. The double aspect is well stated by Story[1]. "Courts of equity," he says, "have authority to act upon the person; *Aequitas agit in personam.* And although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land." The decrees and orders of the court can only be carried into effect through some person who is before the court and upon whom there is some claim falling within a recognised head of equity. The disabling side of the matter thus appears—the court can only order one party to do or forbear from doing something which concerns another party having a personal claim upon him in reference to the act in question: "for" (to quote from a treatise[2] on equity dated before the modern changes), "as it merely acts *in personam*...it can only make a decree between them

[1] *Equity Jurisprudence*, Ed. 1892, sec. 743.
[2] Jeremy, *Equity Jurisdiction* (1828), 555.

where the party defendant is within its power." Put from another point of view, the theoretical position is that a court of equity cannot issue process against property, but only against persons[1].

The execution of a common law judgment in ejectment was carried out by the writ of *habere facias possessionem*, a writ directed to the sheriff commanding him that without delay he cause the plaintiff to have his possession[2]. The sheriff might thereupon break open the door if he were denied entrance by the tenant, and turn out all persons on the premises[3], and the plaintiff must be there to receive possession. The modern writ of possession[4] has the like effect. Equity on the other hand generally has only the defendant as its sheriff through whom to reach the land.

The execution *in personam* of a court of equity is usually by attachment or committal, the former being by writ directed to the sheriff, the latter by the court itself, through the officer of the Lord Chancellor, the tipstaff. It is said that committal is the proper remedy for doing a prohibited act, and attachment the proper remedy for neglecting to do some act ordered by the court[5], but the distinction is at this day of little consequence. The process of the common law courts for enforcement of their judgments, for example to obtain the delivery of a specific chattel, is by distraint, and they have no more direct process than this, save in one case. That case is the seizure of land. In regard to chattels, it was early settled at common law that the actual thing itself would not be seized and handed over to the claimant[6]; the other party would generally have for the enforcement of his judgment nothing more direct than the compulsion

[1] Prisot, C.J., lays down the point very clearly in a passage in Y. B. 37, Hy. VI., Hil. Pl. 3, cited Holdsworth, *H. E. L.* II. 506 *n.*[1]. He there says that all the court of chancery could do by its writ of subpœna (in its equitable jurisdiction) was to examine the conscience of the party and order him to prison until he do what is required of him; and "si la party voit giser en prison plustost que deliverer l'obligation l'autre est sans remedy."

[2] See form in Gilbert, *Ejectment* (1741), 312.

[3] *Ib.* 108, 109.

[4] Appendix H. to R. S. C. 1883, No. 8.

[5] Callow *v.* Young, 56 L. T. 147 (1887)—Chitty, J.

[6] Holdsworth, *H. E. L.* III. 270.

of distraint upon the defendant to induce him to hand it over. But in the case of land held in feudal seisin, the actual land itself was of far greater importance, and meant far more to its owner, in public as well as private law, than the possession of any one particular chattel rather than another. Here therefore, and, when the action of ejectment was invented, in the case too of land in the possession of a termor, the common law courts made direct use of the executive power of the state, through the sheriff, to seize the land and to eject persons bodily from it so that the successful claimant might enter.

A court of equity will not make a decree to which it cannot give effect. And it need scarcely be added that the courts of common law would not assist an equitable claimant with their powers and remedies: as has been seen above, the common law has very severely ignored equitable right. The consequence is that an equitable estate in land gave from the first and gives now no direct right even in theory to physical possession, in the sense of proprietary right to be maintained against the world at large.

There is however in fact, a process of equity, very seldom resorted to[1], by which the court can through the sheriff execute its orders directly in possession, as regards both land and chattels. That process is the writ of assistance, now superseded as regards land by the writ of possession. There is the authority of Lord Hardwicke[2] for saying that this writ was first introduced in the time of James I. But whatever may have been the origin of the remedy, its existence has not altered the nature of the jurisdiction. As its name implies, it is but a means of assisting the court. "In the particular instance of a decree for delivering up an estate" (to cite from another treatise[3] dated before the Judicature Act), "the court might effectuate its own order by issuing a writ of assistance to the sheriff commanding him to put the plaintiff in possession." Unlike the common law writ of possession, the writ of assistance recites the default in obedience to the order—"in

[1] Cazet de la Borde *v.* Othon, 23 W. R. 110 (1874)—Malins, V.C.

[2] In Penn *v.* Lord Baltimore, 1 Ves. sen. 443, 454 (1750).

[3] Adams, *Equity* (1850), 393.

manifest contempt of us and our said court": and, where the common law writ merely enjoins the sheriff (as against the world in general) to "cause the plaintiff to have his possession," the writ of assistance not only enjoins the sheriff to put the plaintiff into possession, but directs him also as often as occasion shall or may require to defend and keep him in peaceable and quiet possession[1]. There is a much more personal note in all this, and the differences are perhaps significant of the distinction in function—the execution of an order *in personam*, and not of a judgment *in rem*.

Another equitable process, that of sequestration, though also but a process in contempt, is said to be *in rem*[2]. In fact however the property taken is but put *in custodia legis*[3]; while if the defendant refuse to give it up the sequestrators have no power to take it: the process is not by the sheriff, and they are but commissioners appointed by the court. In that case a writ of assistance may be needed to put them in possession[4]. These two processes of execution were no doubt found necessary in such circumstances as the defendant being already in the Fleet for debt or otherwise in prison, or out of the jurisdiction; or even he might find it worth while to be wholly contumacious: persons are known to have suffered the *peine forte et dure* rather than plead to an accusation of felony whereby their heirs might be disinherited. The introduction of these two special writs did not in any way enlarge either the theory or the practice of the equitable jurisdiction *in personam*. It is however a curiosity that, until the Common Law Procedure Act, 1854, sec. 78 (now represented by Order XLVIII, r. 1), made the remedy at law directly effective as regards specific chattels, the common law judgment concerning possession of a chattel could sometimes

[1] See Daniell's *Chancery Forms*, No. 1045.

[2] Stuart, V.C., in Tatham *v.* Parker, 1 Sm. and G. 506, 514 (1853). He stated that the process is said to have been first issued by Lord Keeper Bacon, and was resorted to by reason of the infirmity of the personal remedy in contempt. Williams' *Real Property* says it appears to have been introduced in Elizabeth's reign, but hardly became an established institution before the time of Charles II, 21st Ed. 163 *n.*

[3] Stuart, V.C., *ub. sup.*

[4] Seton, *Judgments*, 6th Ed. 436.

only be enforced by the aid of equity, that is by writ of assistance.

A third small apparent exception to the rule that equity acts *in personam* may be noted in an incident of equitable property. Since "the equitable estate is a mere creature of this court, and subsists in idea only[1]" the court is able to impound an equitable estate to answer the breach of trust of its owner[2] though it cannot so impound a legal interest[3].

The fundamental difference that exists between legal and equitable proprietary right has been noted in the first chapter. Various consequences inevitably follow when the legal estate is outstanding, though an equitable estate may be held even as and for ownership in possession; and in that case these seem particularly anomalous from the practical point of view. The risk to an equitable title of its total defeat by a dealing with the legal estate for valuable consideration without notice has been referred to above. At another important point, an equitable estate in possession falls short of a true proprietary character: it will not support the action for the recovery of land—the old ejectment in a new code of procedure. Again, a merely equitable incumbrancer cannot protect a further advance by tacking, nor is there any tacking between equitable estates, as has been seen. Again also, the various legal incidents which attach to seisin or possession at law are lost to equitable estates: for example, the right of distress for rent (so far as the estoppel between landlord and tenant does not preclude the defence[4]), the rights against lessees and tenants which go with privity of legal estate; the power to create or transfer any legal interest whatsoever in the land[5]. And divers technicalities of the land law are inapplicable to equitable

[1] *Per* Arden, M.R., in Brydges *v.* Brydges, 3 Ves. 120, 126 (1796).

[2] See Lewin, *Trusts*, 12th Ed. 1179 *et seq.*

[3] Fox *v.* Buckley, 3 Ch. D. 508 (C. A.). (Distinguish the case where a party is bound because he cannot both "approbate and reprobate" the same instrument.)

[4] Tadman *v.* Henman, 1893, 2 Q. B. 168—Charles, J. (where the distress was upon goods of a third party, so that no estoppel existed to prevent him from taking the objection) is an example of the distinction.

[5] *E.g.* Crabtree *v.* Bramble, 3 Atk. 680 (1747)—Lord Hardwicke (it is inconsistent with occupation under equitable title to grant a lease of the land).

estates: the Rule in Shelley's case where one of the limitations is legal[1], the need for words of limitation[2] and certain other requirements of form; for a power of attorney under seal to deal with the estate[3], the rules (formerly) of legal merger; the incidence (formerly) of dower. Then too a legal interest can only be vested in a specific person or in ascertained joint owners or a corporation, but an unincorporated and indeterminate group, in the case at least of a charity, can be entitled to an equitable estate[4]. And even though a gift of an equitable interest not charitable may be unenforceable for want of a definite beneficiary, still it will be so far effective that the trustee will be deprived of beneficial enjoyment[5]. Again, divers legal liabilities are avoided by equitable owners: that for instance upon a covenant running with the land[6] (not being a negative covenant enforceable in equity); liability to execution by *elegit* was another liability not falling upon equitable estates until the legislature expressly made them so subject[7]; the former position of dower has been mentioned, and perhaps the most important immunity is from the feudal incidents[8]—equitable estates are extra-feudal. It was advanced by Bacon as an objection to uses before the Statute, "Fourthly, that they are exempted from all such titles as the law subjecteth possessions unto[9]."

In equity, the consequence of one of these facts, that equitable estates do not confer the right to sue for the possession of the land, is a body of doctrine of some little subtlety, which is in process of evolution and is designed to make good the deficiency where possession enters as a factor into the scheme

[1] Van Grutten *v.* Foxwell, 1897, A. C. 658.

[2] *In re* Tringham's Trusts, 1904, 2 Ch. 487—Joyce, J. *In re* Oliver's Settlement, 1905, 1 Ch. 191—Farwell, J.

[3] It has been pointed out that the Public Trustee seems to be an exception; Rules of 1907, 25 (1).

[4] Knight *v.* Knight, 3 Beav. 148 (1840)—Lord Langdale, M.R.

[5] Cooper-Dean *v.* Stevens, 41 Ch. D. 552—North, J.

[6] Hall *v.* Ewin, 37 Ch. D. 74 C. A.; Ramage *v.* Womack, 1900, 1 Q. B. 116 (lessee's covenants in lease taken in name of a trustee).

[7] Statute of Frauds; enlarged by Judgments Act, 1838.

[8] Trinity College, Cambridge *v.* Browne, 1 Vern. 441 (1686), as to heriots; Downe *v.* Morris, 3 Hare, 394 (1844), as to escheat.

[9] *Reading*, Ed. 1804, 34.

of administration of the property. The doctrine cannot be said to be as yet by any means fully developed or settled. Its main application is as between *cestui que trust* and trustee, and to secure to the mortgagor some semblance of his virtual ownership subject to his mortgage.

A *cestui que trust* may, it is said, be entitled under the trust to the possession of the land. Really however his right is very different from the right of the legal owner to possession, and is but the personal right which he is recognised in equity as having against the trustee. The trustee has the legal ownership and usually probably the legal possession. He it is who is usually liable for the taxes incident to ownership; he only, where the settlement comprises a manor, can hold the court. The *cestui que trust* residing upon the land, in the principal mansion house it may be, is in the theory of the law in but by the permission of his trustee. The court however requires the trustee in a proper case to give that permission[1], but this is all the actual possessory right that the owner of an estate settled upon trust really has. Perhaps sometimes in fact the *cestui que trust* in occupation does, as it were by accident, acquire through his entry under the trust some actual legal interest; it has been suggested too that he may be a tenant at will of the trustee[2]. "But," said Cresswell, J., in a case[3] where the point cropped up in connection with the Real Property Limitation Acts, "although it may be well argued, on general principle, as well as on the authority of Garrard *v.* Tuck[4], that a *cestui que trust* who is in possession with the consent, or even the mere acquiescence, of the trustee, must be regarded as his tenant at will, yet this doctrine...applies only to the case where the *cestui que trust* is the actual occupant. If he is only allowed to receive the rents, or otherwise deal with

[1] *In re* Wythes, 1893, 2 Ch. 369—Kekewich, J.; *in re* Bagot's Settlement, 1894, 1 Ch. 177—Chitty, J.; *in re* Newen, 1894, 2 Ch. 297—Kekewich, J. The two first mentioned were cases of tenants for life under the Settled Land Acts.

[2] See *L. Q. R.* xxiv.; *The Legal Estate*, by Edward Jenks, and note thereon at the end by Sir F. Pollock; Cole, *Ejectment* (1857), 445; and cf. R. P. L. Act, 1833, sec. 7.

[3] Melling *v.* Leak, 16 C. B. 652, 669 (1855).

[4] 8 C. B. 231, 250 (1849)—*per* Wilde, C.J.

the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate." The matter comes to this perhaps, that a legal interest may be conferred by actual physical possession, though without title, but the mere taking of rents and profits not in exercise of a more extensive claim of title will not do so[1]. A practical result is that if a *cestui que trust* in receipt of rent allow a stranger to enter, that stranger is at any rate not a tenant at will, assignee of the interest of the *cestui que trust*, but in adverse possession.

Outside the strict relation of trustee and *cestui que trust*, equity will so far at any rate support the possession of an equitable owner, that where such a person has a better claim in the eyes of equity than the legal owner and is in fact once in, the court will restrain the legal owner from taking ejectment proceedings by virtue of his legal title. Here again the court acts upon some equity of the plaintiff against the legal owner, and coming within some well-known head of equity; the right to specific performance of a contract to convey is an example[2].

In the case of chattels, the direct claim to possession at common law is no greater than in equity—not so great, when we reckon the equitable writ of assistance. It is at least as easy therefore to say that the *cestui que trust* if he has a legal interest in case of land has one also in case of chattels. And in fact his interest appears to be that of a bailee[3].

The dubious position at law of the *cestui que trust* in possession of land comes out strongly in regard to the Real Property Limitation Acts. Under those statutes all that is barred is the right of entry or action of the particular claimant. At what point is the possession or receipt of rents and profits by a *cestui que trust* to be deemed adverse to the trustee? Probably some act amounting to a disseisin of the legal owner (for example, the grant of a lease inconsistent with the terms of the trust) would in ordinary cases be needed. But the obscurity connected

[1] See Pollock, *Possession*, 36.

[2] Coles *v.* Pilkington, L. R. 19 Eq. 174—Malins, V.C.

[3] Barker *v.* Furlong, 1891, 2 Ch. 172—Romer, J.

with the "bare trustee" occurs again in this connection. In many cases an old legal estate has been left outstanding in a trustee whose office has long ago ceased to be active. It has been said that there is the distinction to be taken here that mere continued possession without interference by a bare trustee is enough. Time would in that case run from the date when the trustee became "bare" accordingly—if anyone can say when the phenomenon took place. Such a distinction would seem difficult to support in principle. It is supposed to rest upon a case[1] which was decided apparently by analogy to the position existing under the Limitation Act of 1874 between a mortgagor in possession and his legal mortgagee[2]. That position is however not analogous in fact, being governed by a special statutory provision applicable only to the case of money secured upon or payable out of land[3]—and of course it was not intended to decide that a *cestui que trust* in possession or enjoyment of the land is a person so entitled within the section. Whether or not a *cestui que trust* in occupation of land by permission of the trustee is a tenant at will to his trustee, his possession is not, at any rate in the first instance, adverse to the trustee; and it is not easy to see how that possession could become adverse by the mere fact that the trustee becomes "bare." Thereupon, certainly, the *cestui que trust* acquires "the right to call for the legal estate," but the object of that doctrine in former times would have been constantly open to defeat, and its more limited use now would still be so open, were the legal estate liable to become vested in the *cestui que trust* by the operation of the statute. Sir William Grant, M.R.[4], said (in a case where it was a question whether a reconveyance ought to be presumed): "I agree, that length of time does not by itself furnish the same sort of presumption in this case, that it does in a case of adverse possession. Long continued possession implies title; as, if there were a different right, the probability is, that it would have been asserted. But

[1] *In re* Cussons, Limited, 73 L. J. Ch. 296 (1904)—Kekewich, J.
[2] Kibble *v.* Fairthorne, 1895, 1 Ch. 219—Romer, J.
[3] Real Property Limitation Act, 1874, sec. 8.
[4] Hillary *v.* Waller, 12 Ves. 239, 250 (1806).

undisturbed enjoyment does not shew, whether the title be equitable or legal." And it might be added, too, the mere fact that the trustee is bare seems to negative the inference of adverse possession from this non-interference. A conversion case occurring before Lord Hardwicke[1] is also against the distinction. There a deceased *cestui que trust* had become absolutely entitled to the proceeds of land held in trust for sale and had continued in receipt of the rents and profits for two years after becoming so entitled. Nevertheless that great equity judge thought it necessary strongly to emphasise the fact, as confirmatory of an intention to re-convert, that the *cestui que trust* had granted a lease.

It would seem thus that the distinction supposed to rest upon *in re* Cussons Limited can hardly be taken. In the case of a bare outstanding legal estate, as in other cases, something more than mere passivity on the part of the trustee is needed to make the possession of the *cestui que trust* adverse—something in fact inconsistent with the legal title of the trustee and amounting to the assertion of a legal title by the *cestui que trust*. In the case of *in re* Cussons Limited moreover there was in fact such an act—a purported conveyance in fee by the *cestui que trust* in possession more than twelve years before the sale which gave rise to the case—a vendor-and-purchaser summons—, and the actual decision might be explained upon that ground. On the whole the conclusion seems to be that the occupation of land under a merely equitable title is to be ignored as possession of a proprietary character.

Referring to the next, the "difficult enquiry of what is the exact relation between mortgagor in possession and mortgagee," Lord Justice Fry[2] has said: "That we know has sometimes been described as the relation of tenant at will; sometimes it is said to be purely anomalous and *sui generis*."

The mortgagor, unlike the *cestui que trust*, has no right in equity against his mortgagee (apart of course from special provision) to possession of the mortgaged land. That the

[1] Crabtree *v.* Bramble, 3 Atk. 680 (1747).

[2] In Sands *v.* Thompson, 22 Ch. D. 614, 616, when Fry, J.

mortgagee should assume possession if and when he pleases is his principal remedy for safeguarding his security. Though the mortgagor is really, both in the intendment of the parties and for all ordinary purposes, the owner, and the mortgagee is but a person having a security for money charged upon the land, and this fact is duly recognised in equity[1], yet the technical position presents the widest possible divergence from the real. The outcome of equity's endeavours, within the limits of the jurisdiction *in personam*, to approximate the technical position to the real relationship of the parties, is an anomalous and (to a layman) unintelligible makeshift, wearing some semblance of proprietary right, but in reality being nothing of the kind, and in various respects falling short of practical requirements[2]. From this point of view it seems unfortunate if circumstances really necessitate the discontinuance of a registered charge[3], conferring only a group of powers to secure the money lent, such as to sell, to enter into possession, and the like, but no estate. This position of course represents the true relation of the parties to the transaction, and leaves the owner what he is meant to be, the owner subject to fulfilling his financial obligations, and at the same time the complications incident to mortgage estates and to their redemption are avoided. In the case of mortgages of unregistered land a mere charge leaves the mortgagee without his greatest safeguard, since neither a court of equity nor a court of law can place him in possession. Hence as matters stand at present it is essential here that the mortgagee should take the legal estate.

It is of course well known that the mortgagor is usually left in actual possession by the legal mortgagee so long as all goes well. Equity has never had occasion to develop rules for restricting any undue exercise by the mortgagee of his right to take possession, because the responsibilities which he thereby assumes have been found in practice to be sufficient to deter

[1] Casborne *v.* Scarfe, 1 Atk. 603 (1737)—Lord Hardwicke.

[2] Can anything better shew the falsity of the position than the absurd fact that it is the mortgagee of copyholds, not the real owner, who is liable to feudal incidents, for example—and it would be difficult to find a more unintelligible—to yield a heriot; Copestake *v.* Hoper, 1908, 2 Ch. 10—C. A.

[3] Land Transfer Commission, Second Report, 1911, 38.

him from doing so without strong necessity, that is, contrary to the understanding of the transaction. "Few mortgagees with a sufficient security," it has been said, "care to do so[1]" and Lord Hardwicke has commiserated the lot of a mortgagee forced to enter into possession, as "a bailiff to the mortgagor without salary, subject to an account[2]." "And it is a great sore," said Lord Hale, C.J., also, "that mortgagees are but bailiffs[3]."

But even so, in the days when seisin meant more in practical importance than it does now, it was frequent to grant mortgages in the form of long terms, thus securing to the mortgagee his right to recover possession by ejectment and to the mortgagor his seisin. It is perhaps curious that this is not more done now—possibly the reason is that in these days land is a more marketable asset than formerly and sale a better remedy than the taking of rents and profits, and a fee simple is of course more marketable than a term of years.

Although the mortgagor, unlike the *cestui que trust*, is not helped in equity against his mortgagee in the matter of possession, nevertheless he is looked upon by courts of equity as a rightful occupier, and his interest has even been spoken of by Lord Hardwicke[4] as seisin in possession equivalent in equity to seisin at law. But since equity will not act in the matter against the mortgagee it is little that can in fact be done to secure the mortgagor in his ownership at all, and his statutory remedies are still very imperfect. Lord Selborne has well described his position[5]: "The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be 'at the will,' or by the 'sufferance,' or 'permission' of the mortgagee, under a 'tacit agreement' which the mortgagee might determine at his

[1] Farwell, L.J., in Ellis *v.* Glover, 1908, 1 K. B. 399.

[2] Gould *v.* Tancred, 2 Atk. 534 (1742).

[3] Roscarrick *v.* Barton, 1 Ch. Ca. 220 (1671).

[4] Casborne *v.* Scarfe, *ante*, at p. 606. And a modern Act of Parliament can use the contradictory term; Representation of the People Act, 1867, sec. 5—"seised at law or in equity."

[5] Heath *v.* Pugh, 6 Q. B. D. 345, 359—C. A.

pleasure[1]. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits so long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee. The former Statute of Limitations (21 Jac. I. c. 16) did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee:" (his Lordship here cited some authorities, and continued) "It may be added, that by the Judicature Act of 1873 (sec. 25), a mortgagor, entitled for the time being to the possession of land, as to which no notice of his intention to take possession has been given by the mortgagee, is recognised as having a right in respect of which it was thought fit that he should be enabled to sue for possession, and for the recovery of rents and profits, in his own name."

This section also gives him power to recover damages in respect of any "trespass or other wrong" relative to the mortgaged land. It does not apparently give his assignee, incumbrancer upon the equity of redemption, these remedies: the law seems to contemplate only one effective mortgage of the same land, save in the case of registered charges and save that a second mortgagee seems to be given the statutory power of appointing a receiver.

Another step towards approximating the technical to the real position is made by the Conveyancing and Law of Property Act, 1881. The effect of sec. 10 of that Act (annexing the obligations of a lease to the income of the land) has been found to be that a mortgagor in receipt of the rents and profits can sue on the covenants in the lease to enforce those obligations[2]. The Act, too, by sec. 18 confers upon the mortgagor certain powers of leasing unless these are expressly excluded by the mortgage deed—which it is the unfortunate practice to do more often than the security really requires.

[1] For a discussion as to the legal nature of this possession, see Fisher, *Mortgages*, 6th Ed. (1911), 451, and *Sm. L. C.* 11th Ed. (1903), I. 542 (Note to Keech *v.* Hall, where the conclusion is that there is no ground for saying that he is anything more than a tenant at sufferance).

[2] Turner *v.* Walsh, 1909, 2 K. B. 484—C. A.

It is said that a mortgagor may distrain, upon the ingenious supposition that he has the implied authority of the mortgagee to do so as his bailiff[1]. Presumably it must with equal ingenuity be imagined that the mortgagor indemnifies him in the process against liability for wrongful distress.

It has been held that a mortgagor may obtain an injunction against injury to the mortgaged property[2] by a third party, by virtue of his interest in it, as any other person with a sufficient interest in equity may do.

This is about as far as the structure appears to have gone at present towards rebuilding in equity the edifice of the ownership of the mortgagor after the episode of a legal mortgage, and towards placing him in the eye of the law in his true position, that of owner subject to a charge to secure money.

The 5th sub-section of the Judicature Act, sec. 25, has been found to have this limit, that a mortgagor in receipt of rents and profits is not thereby enabled to sue for possession; the words of the sub-section, it has been held, are to be read *reddendo singula singulis*[3]. Another unfortunate distinction also apparently arises upon this section, in that the "wrong" there referred to seems to include only a wrong independent of contract, and not for example a breach of covenant to insure against fire or to repair[4].

In the 18th section of the Conveyancing Act also there has recently been disclosed a somewhat unnecessary distinction: that a lease cannot be validly granted under that section if other land in addition to the mortgaged land be included in the lease[5]. And another shortcoming in that so far very useful section has been disclosed: it does not enable the mortgagor to accept the surrender of a lease[6].

The position in equity as regards the possessory rights of both *cestui que trust* and mortgagor is further complicated by

[1] Matthews *v.* Usher, 1900, 2 Q. B. 535, 539—*per* Romer, L.J.
[2] Fairclough *v.* Marshall, 4 Ex. D. 37—C. A.
[3] Matthews *v.* Usher, *supra.*
[4] Bramwell, L.J., in Fairclough *v.* Marshall, at p. 45.
[5] King *v.* Bird, 1909, 1 K. B. 837—Bucknill, J.
[6] Robbins *v.* Whyte, 1906, 1 K. B. 125—Warrington, J.

the question of parties. Warrington, J., in a recent case[1] said that the well-accepted practice of the court with regard to an action brought by an equitable owner of property is that the legal owner must be a party to the action in order to be bound; and if he does not bring the action, the plaintiff proves the fact and makes him a defendant—if, it may be added, he can be found and served. Even then it is often a matter of considerable expense to trace the legal estate, perhaps through several sets of trustees and settlements, and perhaps representation has to be obtained to deceased owners, perhaps also it becomes necessary to approach earlier vendors and revive transactions long since buried. Lindley, L.J., too, has said[2]: "For a plaintiff to come into court and say that he is a *cestui que trust* and to claim possession of the property in respect of which he is the *cestui que trust* without bringing all the parties before the court is a proceeding which cannot be maintained." The trustee, the owner of the legal estate, must be a party.

It would seem however at first sight that in the case of a mortgagor who has no right to possession against his mortgagee, the mortgagee can have no interest in an action brought against a stranger. In the case of a *cestui que trust*, the trustee is interested for at any rate one reason—that the trust must be established against him before the action can proceed. It has been seen that the mortgagee is not a necessary party at any rate where an injunction is sought against injuries by a third party, and an action for recovery of possession does not seem necessarily different in this respect. Wherever, in fact, the possession is claimed from one against whom the court has jurisdiction by reason of the existence of some sufficient equity moving from him to the claimant, there is perhaps no reason why possession cannot be awarded to him as between parties without joining the legal mortgagee. This would seem to be in accordance with the statement of Lord Redesdale[3] as to the

[1] Bowden Syndicate Ltd. *v.* Smith, 1904, 2 Ch. 86, 91.

[2] Allen *v.* Woods, 68 L.T. 143 (1893).

[3] Mitford, *Pleadings*, 2nd Ed. 1787, 30, and later editions. He adds a footnote: "Hence there sometimes arises an absolute defect of justice, which seems to require the interposition of the legislature." The legislature as yet has

joinder of parties: namely, that "if the absent parties are merely passive objects of the judgment of the court, or their rights are incidental to those of parties before the court, a complete determination may be obtained; but if the absent parties are to be active in the performance of a decree, or if they have rights wholly distinct from those of the other parties, the court cannot proceed to a determination against them."

But it is clear that the court cannot do more to protect the equitable right to possession than enforce some special equity against the party who would interfere with that right. The only cases that seem to have attracted attention in the text books at present are those where the claim to possession is by virtue of an express trust, namely against the trustee as the legal owner. Here of course the legal estate comes before the court. But an Irish case has occurred where a second mortgagee successfully claimed possession against the mortgagor in possession, though the first legal mortgagee was not a party to the action[1]. Some expressions in the judgments however seem to carry the matter too far and to lay that decision open to criticism. The court, also, seems to have considered that it was empowered to dispense with the joinder of a legal mortgagee by virtue of O. XVI, r. 11 (as to mis-joinder of parties), but that Order—a mere rule of procedure—did not of itself and could not make a fundamental change in the law so as to give a jurisdiction where none before existed. The question upon which that case really turned seems to be, can possession be obtained in the absence of the party entitled at law to possession in a court of equity from some other person in possession? If the person in actual possession is not the party against whom possession is sought, no doubt the legal owner is a necessary party, for he only has the power to obtain it and to place the claimant in possession and to eject the third person. Such a case occurs where a mortgagor remaining in receipt of

however done very little, but there is due precedent for such deliberation. The introduction of judgment in default of appearance, carried out in 1832, stood authoritatively recommended (by Bracton) for nearly 600 years; P. and M. *H. E. L.* II. 592, *n.*[3].

[1] Antrim *v.* Stewart, 1904, 2 I. R. 357—C. A.

rents and profits, has to eject a disseisor of his tenant: he can only do so with the help of the mortgagee. But if the defendant be in actual possession, it is certainly reasonable to suppose that the case is otherwise. Then the only circumstance needed to give the court jurisdiction to order the change of possession between the parties would seem to be an equity, falling under some known head, against the defendant and in favour of the plaintiff in regard to that possession; and this whether the plaintiff has any legal title or not. The mere fact of disseisin of course gives no such equity—some established head of equity is needed. In Antrim *v.* Stewart such an equity perhaps existed in the fact that the mortgagor in resisting the claim was seeking to derogate from his grant—of, among other securities for the money lent, such possessory rights, whether legal or otherwise, as he had. An authority, too, was cited in that case for an application of the idea of a legal obstacle not to be set up against conscience[1], though the case cited was one of misrepresentation, and furnished therefore a very strong case in conscience.

In one instance the legislature has enabled the legal owner, even when a necessary party, to be dispensed with; namely, by the Trustee Acts, which have enabled an order appointing a new trustee to be made in the absence of an existing trustee in certain cases[2].

It has been held too that where the mortgagor has sold his equity of redemption, the mortgagee is not a necessary party to an action for specific performance by the purchaser[3]. The reason of course is that the mortgagee is a stranger to the contract and neither entitled to the right nor subject to the liabilities arising out of it, and the performance of it cannot affect his security, nor the legal estate. So neither is the mortgagor a necessary party where the action relates to the sale by the mortgagee under his power of sale[4].

[1] Blennerhassett *v.* Day, 2 Ball and Beatty, 104 (1812)—Lord Manners, L.C. of Ireland.

[2] Hyde *v.* Benbow, W. N. 1884, 117. Now the Trustee Act, 1893, sec. 25; and a vesting order may be made under sec. 26.

[3] Tasker *v.* Small, 3 My. and Cr. 63 (1837)—Lord Cottenham.

[4] Corder *v.* Morgan, 18 Ves. 344 (1811)—Grant, M.R.

A curiosity may be noted in passing as to the position of a disseisor of mortgaged land where he is in course of acquiring a prescriptive title. The statute may be stopped if the rightful owner, having granted a mortgage before the disseisin, makes a payment on account of the mortgage[1]. The reason is that the payment saves the statute against the mortgagee, who is not to be deemed guilty of any laches in leaving the mortgagor in possession: the statute so far recognises that possession as rightful and in accordance with the true position between the parties. But if the mortgage be granted after the disseisin, it is otherwise, for a person against whom the statute is running cannot alter the position by granting a mortgage so as to confer on himself in his new capacity of mortgagor a new right of entry against the disseisor[2].

A second mortgagee seems to be in a peculiar position as regards the statute. He may lose his rights by the fact of the mortgagor being in possession without any payment or acknowledgment, just as a first mortgagee may, for he is considered to be entitled to possession against the mortgagor[3]. But it has been held in an Irish case[4] that if the first mortgagee be in possession it is otherwise, for then the second mortgagee has as against the mortgagor no right of entry in respect of which the statute can run. There is an English decision to the contrary so far as concerns the case of a first mortgagee not in possession at the date of the second mortgage. The ground of this decision was that once the statute has commenced to run, the loss of the right to enter does not stop it[5]. This points to a distinction which seems to reconcile the two decisions[6].

Tried by the touchstone of the statute, the possession of the mortgagor would seem actual enough. Indeed the Real Property Limitation Acts seem to assume it to be legal. It is

[1] Doe *v.* Eyre, 17 Q. B. 366 (1851)—Lord Campbell, C.J.

[2] Thornton *v.* France, 1897, 2 Q. B. 143—C. A. This distinction is pointed out in Lightwood, *Time Limit of Actions.*

[3] Kibble *v.* Fairthorne, 1895, 1 Ch. 219—Romer, J.

[4] *In re* Bermingham Estate, 5 I. R. Eq. 147 (1870)—C. A.

[5] Johnson *v.* Brock, 1907, 2 Ch. 533—Parker, J.

[6] Though it has been contended that the English decision is wrong; Lightwood, *ub. sup.* p. 86.

said that the operation of the statute is to vest the legal estate in the person whose prescriptive possession has barred the right of entry of the owner of the legal estate, or to "get in" that legal estate[1]. Where the Act is running in favour of a mortgagor against his mortgagee, there is no pretence of a presumed re-conveyance, and the result therefore seems to involve a legal possession in the mortgagor, good against all but the legal owner until he is barred. Unlike the *cestui que trust*, the mortgagor thus need do no act adverse to the legal title to make a starting-point for the statutory period, and it is difficult to find a ground for supposing that the possession which is secured to him at its end can be other than the possession which was originally left to him by the mortgagee. The result seems to require a possession under legal title, that better right of possession[2], that is to say against the world, which is legal title, though it except the mortgagee. The position, however, seems scarcely to be reconciled with the want of legal remedy at law, but whatever the difficulties arising as to the "parliamentary conveyance," which the courts have been obliged to hold[3] results from the operation of the Real Property Limitation Acts, it is clear that those Acts suppose some legal possession in the mortgagor. And the Conveyancing Act, 1881, sec. 7, also, it has been pointed out[4], seems to assume that a right to possession exists in him.

Such shadows of legal title are, however, too indeterminate and too doubtful to be of practical use, and it is necessary to turn to equity for a reconstruction of the proprietary rights of the mortgagor. But the anomalous "possession *in personam*" which has been examined above seems to be the best that the limitations of that system allow it to do towards furnishing equitable property with possessory rights. Such a makeshift must therefore stand in the place of the principal attribute of property for a very large proportion of the landowners of this country. That it is as good a makeshift as it is, has required

[1] Kibble *v.* Fairthorne, *ante*.
[2] Holdsworth, *H. E. L.* III. 80.
[3] See these discussed in *Sm. L. C.* 11th Ed. II. 719 *et seq.*
[4] Fisher, *ub. sup.* 446.

of equity no mean feat of ingenuity, and one which as might be supposed has scarcely tended to make our land laws simpler or more intelligible.

By applying the same touchstone of the Real Property Limitation Acts, an equitable doctrine is disclosed concerning the legal possession of even the mortgagee himself. It appears that (in equity only, of course): "there can be no two things more distinct or opposite than possession as mortgagee, and possession as owner of the estate[1]. As however the Acts apply to equitable as well as to legal estates, the possession of the mortgagee as such becomes so far altered by the equitable position that he is, for the purposes of the statute, in of different estates respectively before and after foreclosure absolute; so that the statute runs against a mortgagee who has foreclosed, from the date of the order only and not from the time when he could previously have taken possession under his mortgage[2]. His right to that possession was to a different possession and its loss would not start the statutory period against his right as owner when subsequently acquired by the foreclosure. At law, however, he has been owner all along—that is, since the day fixed for redemption, usually six months after the date of the mortgage.

It may be noted also in this connection, that the legal character of the possession of the mortgagor too changes when the relation of mortgagor and mortgagee has ceased. Thus on satisfaction of the mortgage, though before re-conveyance, the mortgagor has been held to become, whatever he may be while the mortgage is on foot, here at any rate an ordinary tenant at will: he is in by permission of the legal owner. Hence the Real Property Limitation Acts in such circumstances operate as in the case of tenants at will accordingly[3].

A small anomaly arising under the Limitation Acts may be mentioned here in passing. The Real Property Limitation Acts take away for good and all the estate of the mortgagee when the statutory period has elapsed against him. But the

[1] Lord Manners in Blake *v.* Foster, 2 Ball and Beatty, 387, 403 (1813).

[2] Heath *v.* Pugh, 6 Q. B. D. 345—C. A.

[3] Sands *v.* Thompson, 22 Ch. D. 614—Fry, J.

debt due in respect of the mortgage money is not destroyed by the Acts, and may be revived: the remedy only is barred. The security cannot be revived[1].

The case of the appointment of a receiver by the court presents a special position. Indeed it would seem at first sight to be one where the court must interfere directly with the actual possession itself. And in fact it is established that upon the appointment of a receiver by way of "equitable execution" the land is "actually delivered in execution" within the meaning of the Judgments Act, 1864.

As between trustee and *cestui que trust*, it is the trustee who if need be must evoke the powers of the law to carry out the order of the court that he shall secure his *cestui que trust* in possession—he stands as it were in the place of the sheriff to execute the order of the court, by means if necessary of legal process of execution. It is the special equity arising by reason of the trust which gives the court this handle, through its command over the trustee. By accepting the trust he has, it might be said, submitted himself to the jurisdiction of the court over him to compel him to carry it out. It is for a like reason that the existence of an express trust will destroy the *tabula in naufragio* in the hands of one who by reason of the notice has become bound by the trust: by the notice he has himself become a trustee[2]. There too the position is similar in that the trust gives a special hold upon him which will, even though the equities be otherwise equal, be enough to prevent the legal estate in that case from carrying all before it.

In the case of a receiver, however, the position is different. Here is no case where the legal estate can be said to be, through the person of a trustee, within the reach of the court.

The receiver is an officer of the court by whose hands the court itself takes possession; and he receives the rents and profits not by virtue of an estate—none is given to him—but as the officer of the court[3]. He is not however such an officer

[1] The distinction is pointed out by Romer, J., in Kibble *v.* Fairthorne, *ub. sup.*

[2] *Ante*, Chapter V.

[3] Kerr, *Receivers*, 5th Ed. 162.

as the sheriff. For whatever the purpose of his appointment, the order is merely personal, since it is only upon those having the custody or possession of the property in question, it is enforced only by the ordinary personal process of the court, and it is made only in the exercise of the personal jurisdiction.

Thus for the purpose of getting in and securing funds, a receiver can only be properly appointed when the court at the hearing or in the course of the cause will have the means of distributing them amongst the persons entitled[1]. Here as elsewhere the court is but acting *in personam* against persons who are before it. It is to be pointed out too that the receiver never takes actual possession; he only receives the rents and profits on behalf of persons within the jurisdiction of the court; such theoretical possession as he has is but as the agent, or caretaker[2], of the person from whom he takes it. And this position is strictly adhered to in the statutory power to appoint receivers given to mortgagees in certain cases by the Conveyancing Act, 1881: by section 24 (2) of that Act, "the receiver shall be deemed to be the agent of the mortgagor."

But as to the "actually delivered in execution" of the Judgments Act? By that Act no judgment, statute or recognizance shall thereafter "affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority[3]." How was equity, unable to act through the sheriff directly against the land, to bring about a delivery of the land such as would after the Act, where the debtor had only an equitable estate, be effective against unsecured creditors? Take the case of a second mortgage. That equitable interest is chiefly made good in this way, that if the first and legal mortgagee should exercise his power of sale, and, after satisfying the moneys due to himself, threaten to pay the surplus proceeds to the mortgagor ignoring the second mortgagee, the court would restrain such a proceeding by injunction, on the ground

[1] Evans *v.* Coventry, 3 Drew. 75, 80 (1854)—Kindersley, V.C.

[2] Kerr, *ub. sup.* 158.

[3] Judgments Act, 1864, sec. 1 (now the Land Charges Act, 1900).

that the legal obstacle—the absence of the legal estate—makes it impossible to reach the land directly[1]. This is the main security of an incumbrancer upon an equity of redemption. In this light the court interpreted the Act: some such indirect means of making good rights which were not enforceable by legal execution must have been what the legislature had in mind when speaking of "other lawful authority"; the Judgments Act had not taken away altogether the right of the judgment creditor in respect of equitable estates by a previous Act expressly given: it had only enacted that the lien of the judgment creditor should not be effective until execution. The words "or other lawful authority," then, must have referred to such substitute for legal execution as equity could provide, where by reason of the legal impediment legal execution could not be had. That substitute is ordinarily the appointment of a receiver. As Mellish, L.J., has said, "The order of the court of chancery effects as to equitable interests what the action of the sheriff does as to legal estates[2]." Any other interpretation would be to take away, "by a side wind" as it was argued, that right of the creditor which the Act had not taken away directly. This not inconsiderable feat of judicial interpretation is now established[3], but it establishes no general proposition as to the possession of a receiver: it only establishes a limit upon the privative effect of the Act as regards the lien of a judgment creditor who has not taken out execution at law.

The whole occasion for such a subtlety of interpretation, for the whole subtlety of the contrivances by means of which the legal position in the case of a trustee or mortgagee is as far as may be reversed and the *cestui que trust* or mortgagor restored to something more like his real position as owner, arises out of the limitations of the equitable jurisdiction—that it is only a jurisdiction *in personam*, and such a jurisdiction is inadequate to the task. It is not that equity has failed to secure the aid of the executive against the land itself; as has been seen, direct executive power exists, and has existed from the time

[1] Thornton *v.* Finch, 4 Giff. 515 (1864)—Stuart, V.C.
[2] Hatton *v.* Haywood, 9 Ch. App. 229, 236—C. A.
[3] *Ex parte* Evans, 13 Ch. D. 252—C. A.

of James I. The matter is not to be mended therefore by giving increased powers to courts of equity. It is rather by extending the remedies at law available to the equitable owner that an alteration can be best effected.

The common law action of ejectment, upon the disappearance of the older remedies, became and still is[1] the only action we have for the recovery of land. That action is available (with the limited statutory exception above noted) only to one having claim to a legal estate in possession[2]. The possession of the mortgagor is, it seems, insufficient at common law to support the action because a tenant at sufferance cannot maintain ejectment. He has no estate at all apart from his actual possession; if he lose that therefore, he loses all, and nothing remains to support a claim to possession. The *cestui que trust* has been seen to be in all probability at law a tenant at will of his trustee. A tenant at will apparently cannot underlet or assign, and should he purport to do so the tenancy determines, with the one qualification that the relation of landlord and tenant is not to be deemed determined to the prejudice of the landlord until he have notice of the alienation[3]. It would follow that a tenant at will cannot bring the action for recovery of his possession, for he cannot grant the lease upon the fiction of which the action is brought, without thereby losing his estate. In ejectment, "the title proved must not be inconsistent with the demise in the declaration[4]." Were the position otherwise, the difficulty as to the *cestui que trust* need never have arisen; and the mortgagor, too, who attorns tenant at will to his mortgagee would so substantially improve his position as to make it worth while to use the attornment

[1] Williams, *Seisin*, 155. [2] Cole, *Ejectment* (1857), 66.

[3] Pinhorn *v.* Souster, 8 Exch. (1853), 763, 772; and the old case there cited in Yelverton, 73 (1605). And Cresswell, J., in Melling *v.* Leak, 16 C. B. 652, 669 (1855), clearly puts the matter thus.

[4] Adams, *Ejectment* (1830), 277. Runnington, *Ejectment* (1781), 10, suggests that inasmuch as the existence of the tenancy until determined prevents the landlord from maintaining the action against the disseisor, the tenant may be allowed to bring it, or the wrong would go unpunished. Cole is silent upon the point. But Blackstone, whose description of ejectment is classical, speaks throughout only of tenant for years as entitled to the remedy; III. 199 *et seq.*

clause (now out of use by reason of the Bills of Sale Acts[1]) in every case.

It would seem that in equity at any rate the possessory rights of the mortgagor are, notwithstanding the above considerations, deemed to be assignable to his second mortgagee. Perhaps equity, in assuming a rightful possession in a mortgagor has not been concerned to enquire very closely into the legal nature of his possession.

As to the possession of equitable owners other than mortgagors and *cestuis que trustent*, such for example as one in under a specifically enforceable contract to convey or having the benefit of a covenant for further assurance, there is little to shew what its nature may be. It can scarcely however be better in equity than the possession of a beneficiary entitled to enter under an express trust, nor at law be more than an estate at will.

The question seems worth careful consideration whether the action for the recovery of land should not be made available by the legislature to equitable owners in possession; persons, that is, for whom equity will now do what it can to secure them in the only sort of possession that the equitable jurisdiction can give. The older freeholder's remedy was given in the time of Edward I to the person having an estate by *elegit*, and to one having an estate by statute merchant[2], though these estates are in each case but chattel interests[3]; and in those days before ejectment was invented, chattel interests in land did not give the right to recover the land itself[4]. The termor's remedy, again, was by a fiction of procedure given to the freeholder[5]. Why should not the present remedy for the recovery of land be given to persons entitled in equity to possession? The proposition has already been so far officially approved that the Common Law Commission of 1853 recommended power being given to repel the inequitable defence to an action of ejectment that the legal estate was outstanding in a trustee for the plaintiff[6]. The Commission of 1829–33, too, recommended

[1] Goodeve, *R. P.* 5th Ed. 394, *n.* (*z*).

[2] *Novel Disseisin*; 13 Ed. I. St. 1, c. 18 (Westminster II) and 13 Ed. I. St. 3.

[3] Holdsworth, *H. E. L.* III. 183.

[4] Maitland, *Forms of Action*, 350.

[5] Holdsworth, *ub. sup.*

[6] Second Report, 45.

that the plaintiff should be allowed to sue in ejectment as well in his own right as in right of any other person under whom he claims a beneficial interest[1]. The same court is of course now competent both to decide who is entitled to possession and to award the remedy. An objection can scarcely be urged that it would be inconvenient were several persons entitled at the same time under different titles to the possessory action in respect of the same land. The common law has long known how to deal with such a case, for it occurs in the circumstances of several judgment creditors existing, all of whom have rights to execution against the same land. And seisin itself is but relative—conferring only a better right to possession; and so there may be, and often is, and from the early days of the common law there always could have been, a competition between several titles, some better, some worse, but all giving the right to recover possession until defeated by proof of the better title of a defendant.

[1] Second Report, 15. And see *per* Lord Mansfield in Doe d. Bristowe *v.* Pegge, 1 T. R. 758 (1785), cited Ch. I, *ante*, as to the equitable nature of the action of ejectment.

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